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In The

Supreme Court of the United States

October Term, 1997

EXXEL/ATMOS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, and
UNITED STEELWORKERS OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

VINCENT J. APRUZZESE
Counsel of Record
FRANCIS A. MASTRO
APPRUZZESE, McDERMOTT,
MASTRO & MURPHY
Attorneys for Petitioner
25 Independence Boulevard
P.O. Box 112
Liberty Corner, New Jersey 07938
(908) 580-1776

148840

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

1. Does an employer violate the National Labor Relations Act, 29 U.S.C. § 158(a)(1)(5), when it suspends bargaining or withdraws recognition from an incumbent union, where its employees have filed a petition for decertification and the National Labor Relations Board (NLRB) has refused to disclose to the Employer whether the petition is supported by a majority of its employees?

2. Does a respondent in an NLRB proceeding waive appellate review by failing to request reconsideration or rehearing regarding the appropriateness of an order to bargain issued by the NLRB?

STATEMENT PURSUANT TO RULE 29.6

All parties to the proceedings in the United States Court of Appeals for the District of Columbia Circuit are listed in the caption of this case, and no other parties appeared in the proceedings below. Petitioner, Exxel/Atmos, Inc., has no parent company or non-wholly-owned subsidiaries, and is not publicly traded.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Opinions Below	1
A. The Circuit Court of Appeals for the District of Columbia Circuit.	1
Statement of Jurisdiction	1
Statement of the Case	5
A. The Proceedings Below	5
B. Factual Background	7
Preliminary Statement	10
Reasons for Granting the Writ	11
I. The Split Of Authority Between The Court Of Appeals For The District Of Columbia Circuit And The Third Circuit As To Whether To Obtain Enforcement Of Its Order The NLRB Must Respond To The Request Of An Employer For Information As To Majority Support Of A Petition For Decertification Requires Resolution By This Court.	11

Contents

Page

II. The Third Circuit's Rule Is Soundly Rooted In Common Sense, And Should Have Been Followed By The D.C. Circuit. 14

III. The Court Of Appeal's Decision As To The Application Of § 10(e) Of The NLRA Raises An Important Question Of Federal Law Which Should Be Resolved By This Court. 17

Conclusion 21

TABLE OF CITED AUTHORITIES

Page

Cases:

Caterair International, 322 NLRB No. 11 (1996) 6, 9

Caterair International v. National Labor Relations Board, 22 F.3d 1114 (D.C.Cir. 1994) 6, 16

Dresser Industries, Inc., 264 NLRB 1088 (1982) 12, 15

Dresser rule in St. Agnes Medical Center v. NLRB, 871 F.2d 137 (D.C. Cir. 1989) 13

Exxel/Atmos, Inc. (*Exxel I*), 309 NLRB 1024, 309 NLRB No. 165, 143 L.R.R.M. (BNA) 1042, 1992-93 NLRB Dec. P 17,677 (*Exxel I*) (N.L.R.B., Dec. 16, 1992) 1, 5, 8

Exxel/Atmos, Inc. v. National Labor Relations Board (*Exxel I*), 28 F.3d 1243 (D.C. Cir. 1994), *petition for rehearing en banc denied* 37 F.3d 1538 (D.C. Cir. 1994) 5, 8, 16

Exxel/Atmos, Inc. v. NLRB, 28 F.3d 1243 (D.C. Cir. 1994) 1, 8

Exxel/Atmos, Inc. (*Exxel II*), 323 NLRB No. 158, 155 L.R.R.M. (BNA) 1146, 1997-1998 NLRB Dec. P.16, 281 (June 5, 1997) 1, 5, 6, 9, 10

Exxel/Atmos, Inc. v. NLRB (*Exxel II*), 147 F.3d 972, 158 L.R.R.M. (BNA) 2699, 135 Lab. Cas. P.10,190 (D.C.Cir. 1998) (No. 97-1417) 1, 6

Table of Cited Authorities

	Page
Facet Enterprises, Inc. v. NLRB, 907 F.2d 963 (10th Cir. 1990)	19
Hotel, Motel & Restaurant Employees v. NLRB, 785 F.2d 796 (9th Cir. 1996)	13
Lee Lumber & Building Materials Corp. v. NLRB, 117 F.3d 1954 (D.C. Cir. 1997)	6, 9
Micro-image Display Division of Xidex Corp. v. NLRB, 924 F.2d 245 (D.C. Cir. 1991)	7, 11
National Labor Relations Board v. New Associates, 35 F.3d 828 (3d Cir. 1994),	9, 10
NLRB v. New Associates, 35 F.3d 828 (3d Cir. 1994)	7, 11
NLRB v. New-Southern Dyeing & Finishing, Inc., 444 F.2d 11 (4th Cir. 1970)	13
Oil, Chemical & Atomic Workers International Union v. NLRB, 842 F.2d 1142 (9th Cir. 1988)	19
Quazite v. NLRB, 87 F.3d 439 (D.C. Cir. 1996)	7, 20
Telautograph Corp., 199 NLRB 892 (1972)	12
Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645 (1982)	7, 17, 18, 19, 20

Table of Cited Authorities

	Page
Statutes:	
NLRA § 7	10
NLRA § 8(a)(1)	5, 8
NLRA § 8(5)	5, 8
NLRA § 8(a)(5)	5, 6
NLRA § 10(c)	20
NLRA § 10(e)	7, 17
NLRA § 102.18	12
29 U.S.C. § 160(e)	6, 7
29 U.S.C. § 160(f)	6
28 U.S.C. § 1254	2
29 U.S.C. § 157	2
29 U.S.C. § 158(a)(1)	2
29 U.S.C. § 158(5)	2
29 U.S.C. § 159(c)(1)(A)(ii)	12
29 U.S.C. § 160(e)	3, 18

Table of Cited Authorities

	Page
29 U.S.C. § 160(f)	4
29 U.S.C. § 178(c)	2
Rule:	
Rule 10(a)	7

APPENDIX

	Page
Appendix A — Opinion Of The United States Court Of Appeals, District Of Columbia, Decided June 26, 1998	1a
Appendix B — Order Of United States Court Of Appeals, District Of Columbia, Dated December 14, 1995	18a
Appendix C — Order Of The United States Court Of Appeals, District Of Columbia, Dated November 4, 1994	19a
Appendix D — Opinion Of The United States Court Of Appeals District Of Columbia Circuit Decided July 15, 1994	25a
Appendix E — Decision And Order Of TheNational Labor Relations Board, Dated June 5, 1997	39a
Appendix F — Supplemental Decision And Order Of The National Labor Relations Board Dated June 5, 1997	53a
Appendix G — Decision And Order Of TheNational Labor Relations Board, Dated December 16, 1992	59a
Appendix H — Order Of The United States Court Of Appeals For The District Of Columbia Filed August 26, 1998	101a

Appendix

Page

Appendix I — Order Of The United States Court Of Appeals For The District Of Columbia Filed August 26, 1998 ..... 103a

Appendix J — Letter To Mark J. Langer From John D. Burgoyne And Attached Judgment, Dated August 21, 1998 ..... 105a

Appendix K — Order Of The United States Court Of Appeals For The District Of Columbia Circuit, Filed June 26, 1998 ..... 112a

Appendix L — Order Of The United States Court Of Appeals For The District Of Columbia Filed Septmeber 22, 1998 ..... 114a

Appendix M — Letter To Andrew J. Charnick, Jr. From Francis J. Connell III Dated January 10, 1998 ..... 116a

Appendix N — Letter To Regional Director Of The National Labor Relations Board From Francis J. Connell III Dated January 10, 19981 ..... 18a

Appendix O — Letter From The National Labor Relations Board To Jay Soni, Dated January 13, 1995 ..... 120a

Appendix P — Notice Of Refusal To Join Union, Dated January 3, 1995 ..... 121a

Appendix Q — Petition Of The National Labor Relations Board, Dated January 26, 1995 ..... 122a

Appendix

Page

Appendix R — Letter To Susan D. Schwartz, Board Agent For The National Labor Relations Board From Francis J. Connell III Dated January 30, 1995 ..... 125a

Appendix S — Letter From The National Labor Relations Board To Francis J. Connell, Iii, Dated February 2, 1995 ..... 130a

Appendix T — Oral Argument Of The United States Court Of Appeals For The District Of Columbia Circuit, Dated April 9, 1998 ..... 132a

OPINIONS BELOW

A. The Circuit Court of Appeals for the District of Columbia Circuit.

(1) The decision of the D.C. Circuit was filed on June 26, 1998 and is reported as *Exxel/Atmos, Inc. v. NLRB* (*Exxel II*), 147 F.3d 972, 158 L.R.R.M. (BNA) 2699, 135 Lab. Cas. P.10,190 (D.C.Cir. 1998) (No. 97-1417). (1a-17a) It is this decision which is the subject of this petition.

(2) *Related Decision: Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243 (D.C. Cir. 1994). (25a-38a)

B. The Decision of the National Labor Relations Board (NLRB)

The decision of the NLRB, which was the subject of review in the above case, is reported as *Exxel/Atmos, Inc.* (*Exxel II*), 323 NLRB No. 158, 155 L.R.R.M. (BNA) 1146, 1997-1998 NLRB Dec. P.16, 281 (June 5, 1997) (No. 22-CA-20475). (39a-52a)

Related Decisions:

1. *Exxel/Atmos, Inc.*, 323 NLRB No. 159, 155 L.R.R.M. (BNA) 1148 (N.L.R.B., June 5, 1997) (No. 22-CA-17889) (53a-58a).

2. *Exxel/Atmos, Inc.* (*Exxel I*), 309 NLRB 1024, 309 NLRB No. 165, 143 L.R.R.M. (BNA) 1042, 1992-93 NLRB Dec. P 17,677 (*Exxel I*) (N.L.R.B., Dec. 16, 1992) (No. 22-CA-17889) (59a-100a).

STATEMENT OF JURISDICTION

On June 26, 1998 the United States Court of Appeals for the District of Columbia Circuit issued a Decision enforcing in part an order of the NLRB requiring Exxel/Atmos, Inc. (Exxel) to bargain with United Steelworkers of America, AFL-CIO/CLC (Steelworkers or Union), as the representative of its employees despite the fact that such employees had filed a petition for decertification and the NLRB had refused, upon request, to advise Exxel whether such petition was

supported by a majority of its employees. The Court of Appeals further held that Exxel had waived objection to the Board's bargaining order by failing to ask for reconsideration or rehearing by the NLRB before addressing the issue of the appropriateness of the Order in its appeal to the circuit court.

At the time of filing a judgment had been proposed by the NLRB but not entered. (105a-111a). Petitions for Rehearing and Suggestion for Rehearing En Banc were denied on August 26, 1998. (101a-104a) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 AND 29 U.S.C. § 178(c).

STATUTORY PROVISIONS

The provisions of the National Labor Relations Act of 1947, as amended which are involved herein are:

Section 157; 29 U.S.C. §157

Right of employees as to organization, collective bargaining, etc.

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

Section 158(a)(1) and (5); 29 U.S.C. §158(a)(1) and (5)

(a) Unfair labor practices for an employer

"It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

Section 160(e); 29 U.S.C. § 160(e)

(e) Petition to court for enforcement of order; proceedings; review of judgment

"The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part

the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. . . ."

Section 160(f); 29 U.S.C. § 160 (f)

(f) Review of final order of Board on petition to court

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on

the record considered as a whole shall in like manner be conclusive."

STATEMENT OF THE CASE

A. The Proceedings Below

In *Exxel/Atmos, Inc.* (*Exxel I*), 309 NLRB 1024 (1992), the NLRB found that Exxel had violated § 8(a)(5) of the National Labor Relations Act (NLRA or the Act) by refusing to bargain with and withdrawing recognition from the Steelworkers after learning of a petition being circulated by its employees indicating that they did not wish to be represented by that labor organization. The remedy imposed by the NLRB required Exxel to cease and desist from refusing to meet and to bargain collectively with the Steelworkers. It also affirmatively required Exxel to recognize and bargain with the Steelworkers, thus imposing a bargaining order upon the Employer which would preclude a petition for decertification by its employees for a period of one year.

The Board's decision was reviewed by the United States Court of Appeals for the District of Columbia in *Exxel/Atmos, Inc. v. National Labor Relations Board* (*Exxel I*), 28 F.3d 1243 (D.C. Cir. 1994), *petition for rehearing en banc denied* 37 F.3d 1538 (D.C. Cir. 1994). In that decision the District of Columbia Circuit enforced those portions of the Board order which found a violation of Sections 8(a)(1) and (5) of the Act and ordered Exxel to cease and desist from refusing to recognize and bargain with the Steelworkers. (A cease and desist order precludes a petition for decertification for a reasonable period, but not necessarily one year). The court remanded the affirmative remedial aspect of the NLRB's bargaining order to the NLRB for an explanation of its necessity under the circumstances of this case.

While the remand was pending, the NLRB issued a second decision involving events which took place subsequent to the remand. In that decision, *Exxel/Atmos, Inc. and United Steelworkers of America, AFL-CIO* (*Exxel II*), 323 NLRB No. 158 (1997), the NLRB found that the employer had violated the Act by unilaterally granting its employees a Christmas bonus, by giving a speech to employees in

which it "instigated" the filing of a decertification petition, and by refusing to bargain with the Union in violation of Sections 8(a)(5) and (1) of the Act. It again issued both a cease and desist and affirmative bargaining order, requiring Exxel to recognize and bargain with the Steelworkers. At the same time, the Board issued a supplemental decision in response to the Circuit's remand in *Exxel I*, in which it offered no explanation for its imposition of a bargaining order, as requested by the circuit court, but simply referred the court to its general explanation in *Caterair International*, 322 NLRB No. 11 (1996), enforced in part and remanded in *Caterair International v. National Labor Relations Board*, 22 F.3d 1114 (D.C.Cir. 1994), an approach which the District of Columbia Circuit earlier had specifically rejected in *Lee Lumber & Building Materials Corp. v. NLRB*, 117 F.3d 1954 (D.C. Cir. 1997). (53a-58a)

Exxel sought review of both the NLRB's decision in *Exxel/Atmos, Inc.* (*Exxel II*), 323 NLRB No. 158 (1997) (No. 97-1417) and the NLRB's supplemental decision in *Exxel/Atmos, Inc.* (*Exxel I*), 323 NLRB No. 159 (1997) (No. 97-1418). The NLRB filed cross-petitions for enforcement in both cases. The petitions in Nos. 97-1417 and 97-1418 were consolidated for decision by the District of Columbia Circuit. The court assumed jurisdiction pursuant to 29 U.S.C. § 160(e) and (f).

Certiorari is sought with regard to the decision of the District of Columbia Circuit in *Exxel/Atmos, Inc. v. NLRB* (*Exxel II*), 147 F.3d 993 (D.C. Cir. 1998). In that decision, the Circuit found that a speech given by Exxel's President and the granting of a $100 bonus at Christmas time, found by the NLRB to be independent violations of Section 8(a)(1) of the Act, did not violate the Act. Therefore, the court denied enforcement of that portion of the NLRB's Order which related to these alleged violations. Nevertheless, it enforced the NLRB's affirmative bargaining order, requiring the Employer to bargain with the Union for a period of one year before either the Employer or its employees could petition the NLRB for an election. In doing so, the court acknowledged that under some circumstances an employer may suspend bargaining if it "can show by 'clear, cogent and convincing' evidence either that the union has lost majority support or that the employer has a reasonable good faith doubt of continuing

majority support". (12a) *Citing Micro-image Display Division of Xidex Corp. v. NLRB*, 924 F.2d 245, 253 (D.C. Cir. 1991). It also recognized that Exxel had twice requested by letter that the NLRB inform it whether a majority of Exxel's employees had petitioned for decertification, and that the NLRB had refused each request. (13a) Nevertheless, the court held that this fact did not excuse Exxel from complying with its initial cease and desist Order. (13a) In so doing, the circuit court cited but failed to adopt the rule of the Third Circuit in *NLRB v. New Associates*, 35 F.3d 828 (3d Cir. 1994). (13a) In *New Associates*, the Third Circuit held that it would deny enforcement of a bargaining order in cases where the NLRB has refused to provide the Employer, upon request, with information as to the majority support of its employees for a petition for decertification, unless there is other evidence that the employer is aware of the insubstantiality of the decertification petition. Thus, there is a direct conflict between the District of Columbia Circuit and the Third Circuit within the meaning of Rule 10(a) as to this important issue of labor law and the application of the NLRA.

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The Circuit then went on to enforce the NLRB's affirmative bargaining order, holding that Exxel had never contested the propriety of the affirmative bargaining order in the proceedings before the Board. (13a-14a) Thus, the court held that under Section 10(e) of the Act it lacked jurisdiction because Exxel had waived any right it had to object to the Order before the circuit court. 29 U.S.C. § 160(e). In support of that conclusion the circuit cited this court's decision in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) and its own decision in *Quazite v. NLRB*, 87 F.3d 439, 497-98 (D.C. Cir. 1996).[1] (13a-14a)

B. Factual Background

On September 7, 1990, over eight years ago, Exxel, without the vote of its employees, voluntarily recognized the Steelworkers as the collective bargaining representative of its production and maintenance employees, quality control employees, laboratory technicians and

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1. In view of this disposition, the court denied the petition for review and cross-petition for enforcement in No. 97-1418.

senior technicians. (66a) After the commencement of bargaining, Exxel learned of employee disaffection with the Union. Consequently, in August, 1991 Exxel withdrew recognition and "informed the NLRB that it no longer believed that the Union represented a majority of workers in the bargaining unit and requested a NLRB-sponsored election". *Exxel/Atmos, Inc. v. NLRB* (*Exxel I*), *supra*, 28 F.3d at 1245. (29a) The Union then filed unfair labor practice charges against Exxel alleging an unlawful and premature withdrawal of recognition. On July 23, 1992, following a hearing, an Administrative Law Judge issued a decision finding that Exxel had violated §§ 8(a)(1) and 8(a)(5) of the Act by withdrawing recognition from the Union.[2] (29a) On December 16, 1992 the NLRB adopted the conclusions of the Administrative Law Judge and entered an order requiring that Exxel cease and desist from engaging in conduct found to be in violation of the Act. The NLRB also issued a bargaining order affirmatively requiring Exxel to bargain with the Union. *Exxel/Atmos, Inc.* (*Exxel I*), 309 NLRB 1024 (1992). (59a)

On respondent's petition for review and the NLRB's cross-petition for enforcement, the District of Columbia Circuit affirmed the NLRB's finding that Exxel had violated §§ 8(a)(1) and 8(a)(5) of the Act. *Exxel I*, 28 F.30d at 1247. (25a-38a) While upholding the NLRB's issuance of a cease and desist order, the Court nevertheless refused to enforce the NLRB's bargaining order because the NLRB had failed to explain why it needed such an extraordinary remedy. *Exxel I*, 28 F.3d at 1249. (34a-38a) In doing so, the court went to considerable length to explain that a bargaining order is particularly inappropriate without an explanation based upon a case-to-case factual analysis because unlike a cease and desist order, a bargaining order will bar a petition for decertification or other challenges to the union's representational status for a reasonable period, normally a year. *Exxel*, 28 F.3d 1248-49. (34a-35a) Therefore, the court remanded the case to the NLRB with direction that it explain the need for a bargaining order. *Id.* at 1249. (38a) On August 17, 1994, the NLRB petitioned for a rehearing *en banc*, arguing for a remedial bargaining order

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2. The RM petition, 22-RM-679, filed on August 7, 1991, was never processed by Region 22 due to the unfair labor practice charges filed by the Union and the Board's so-called blocking charge policy. (68a)

because under the cease and desist order Exxel's employees could seek to decertify the Union at any time. The District of Columbia Circuit denied the petition on November 4, 1994. (19a-24a)

On June 5, 1997, *almost three years after the remand*, the NLRB issued the Supplemental Decision which was the subject of the petition and cross-petition in Case No. 97-1418. *Exxel/Atmos, Inc.* (*Exxel I*), 323 NLRB No. 159 (1997). (53a-58a) In that decision, the NLRB defiantly failed or refused to provide the explanation called for on remand. Rather, it simply referred the court to its decision in *Caterair International*, 322 NLRB No. 11 (1996), an approach which the District of Columbia Circuit subsequently rejected and characterized as "disingenuous" in *Lee Lumber & Building Materials Corp. v. National Labor Relations Board*, 117 F.3d 1454 (D.C. Cir. 1997).

After the mandate was issued and pursuant to the court's Order, Exxel posted the required Board Notice and contacted the Union to resume bargaining. A meeting was scheduled for January 11, 1995. (12a; 116a-117a)

In January, 1995, an Exxel employee sent anti-union statements signed by thirteen individual employees to NLRB Region 22, each stating that the undersigned employee did not want Union representation. (42a) The unit at this time consisted of twenty-three employees. (119a) Management was informed of these statements. (42a) By letter dated January 10, 1995, then counsel for Exxel notified NLRB Region 22 that Exxel had learned that a number of employees had approached Region 22 in an effort to decertify the Union, and consequently that the Company was postponing negotiations pending clarification of the matter. In that same letter, counsel asked the Region whether any decertification petition filed was signed by at least 50% of Exxel's 23 bargaining unit employees. (118a-119a) His request was repeated in a letter dated January 30, 1995, after the petition had been filed. He again specifically asked whether the petition had been signed by a "majority" of the company's then 23 bargaining unit employees. (125a-129a) The Region refused to provide this information. (130a-131a)

The purpose of this inquiry by Exxel's attorney was to follow the rule announced by the Third Circuit in *National Labor Relations*

Board v. New Associates, 35 F.3d 828, 835 (3d Cir. 1994), in which that court held that the filing of a decertification petition by employees in itself provides sufficient grounds for a good faith doubt of the union's majority status. Moreover, the Third Circuit held that if the Region will not advise the court and the employer of the number of employees that have signed the petition, "absent other evidence that the employer is aware of the insubstantiality of the decertification petition", petitions by the NLRB for the enforcement of a bargaining order would not be granted.

Counsel also notified the Union that the bargaining session that had been scheduled for January 11, 1995 would be suspended pending clarification of the situation. (116a-117a) On January 26, 1995, following the above mentioned correspondence with a Region 22 Board Agent, the employees filed a decertification petition. (122a-124a) Thereafter, on January 30, Exxel's counsel again wrote the Region advising of Exxel's good faith doubt as to the Union's majority status, and again asking whether the employees' petition for decertification was supported by a majority of the bargaining unit. Again, the NLRB refused to provide such information. (130a-131a)

On February 21, 1995, the Union filed the unfair labor practice charges which culminated in the NLRB's decision in *Exxel/Atmos, Inc.* (*Exxel II*), 323 NLRB No. 158 (1997), which was the subject of the petition for review and cross-petition for enforcement in No. 97-1417. To remedy the alleged unfair labor practices, the NLRB issued an affirmative bargaining order, which, as stated above, was the subject of the petition, and cross-petition in No. 97-1417, and which is now the subject of this petition for certiorari.

PRELIMINARY STATEMENT

This case involves a continuing effort by an employer and its employees to secure a secret ballot NLRB election, whereby those employees would determine whether they wish to be represented for purposes of collective bargaining by a labor organization — *a right that has been denied to them for eight years*. This case therefore concerns the core principles of the NLRA and the rights guaranteed to employees under § 7 of that Act.

Resolution of the questions presented by this petition will determine whether an election is finally conducted by the NLRB. These issues go far beyond the parameters of this particular case and significantly impact upon the uniform application of our national labor policy, as expressed by the NLRA and administered by the NLRB.

REASONS FOR GRANTING THE WRIT

I.

THE SPLIT OF AUTHORITY BETWEEN THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE THIRD CIRCUIT AS TO WHETHER TO OBTAIN ENFORCEMENT OF ITS ORDER THE NLRB MUST RESPOND TO THE REQUEST OF AN EMPLOYER FOR INFORMATION AS TO MAJORITY SUPPORT OF A PETITION FOR DECERTIFICATION REQUIRES RESOLUTION BY THIS COURT.

By virtue of the decision which is the subject of this petition, there now exists between the District of Columbia Circuit and the Third Circuit a direct conflict which goes to the very heart of the administration of the NLRA. That conflict impacts severely upon the right of employees to petition for the decertification of their collective bargaining representative and the right of an employer to withdraw recognition from what it believes to be a minority union. In its decision in this case, the court recognized that ". . . under some circumstances an employer may suspend bargaining if it can show by 'clear, cogent and convincing' evidence, either that the union has lost majority support or that the employer has a reasonable good faith doubt of continuing majority support." *Citing Micro-image Display Division of Xidex Corp. v. NLRB*, 924 F.2d 245, 253 (D.C.Cir. 1991). Nevertheless, the court, although citing the decision of the Third Circuit in *NLRB v. New Associates*, 35 F.3d 825 (3d Cir. 1994), failed to adopt and apply the sound principles expressed in that case.

In *New Associates*, the employer's employees filed a decertification petition with the NLRB, asserting by such petition that at least thirty percent of the employer's employees no longer

desired to be represented by their collective bargaining representative. *See National Labor Relations Act (NLRA)*, 29 U.S.C. § 159(c)(1)(A)(ii). The Union had, in fact, represented the Employer's employees over a period of several collective bargaining agreements.[3] The court found that although the NLRB had made an initial determination that the prescribed minimum number of employees (thirty percent) no longer supported the Union, it did not release the exact percentage of non-supporting employees to the employer. As a result, the employer did not know whether a majority of the employees sought decertification. Nevertheless, it withdrew from further collective bargaining based upon an assertion that the filing of the petition demonstrated a substantial showing of lack of support for the Union.

In *Telautograph Corp.*, 199 NLRB 892 (1972), the NLRB articulated the rule that in the absence of any evidence of employer misconduct, a decertification petition *required the employer* to refrain from further bargaining because the petition itself signified a general question as to the union's representative status. Ten years later, however, in *Dresser Industries, Inc.*, 264 NLRB 1088 (1982), the NLRB did an about-face, holding that *absent evidence that a majority of the employees supported the petition,* such a petition did not reflect the sentiment of the unit majority. *Dresser,* 264 NLRB at 1088. In so doing, however, the NLRB was careful to preserve the right of an employer to withdraw from bargaining whenever, based upon objective evidence, it had a good faith doubt as to the union's continued majority status. Thus, the NLRB stated:

> The rule we announce today in no way erodes the principle that an employer is privileged to withdraw from bargaining if, on the basis of objective evidence, it has a good faith doubt as to the union's continued majority status. *Thus, for example, if an employer is presented with a valid decertification petition, supported by a majority of the unit*

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3. Pursuant to § 102.18 of the NLRB's Statement of Procedure, a petition for decertification must be supported by at least thirty percent of the Employer's employees within the bargaining unit in order to warrant further investigation and processing.

> *employees, it may be privileged to withdraw from bargaining.* We will test an employer's good faith doubt as to continued majority status by our traditional criteria, regardless of the filing of a decertification petition. *Dresser, supra*, at 1089, n. 7. (Emphasis added.)

The District of Columbia Circuit approved of the NLRB's *Dresser rule in St. Agnes Medical Center v. NLRB*, 871 F.2d 137, 146 (D.C. Cir. 1989). In so doing, however, the court pointed out that even under *Dresser* an employer is precluded from asserting a good faith doubt only if its unfair labor practices "significantly contribute to such a loss of majority or to the factors upon which a doubt of such majority is based". That is not the case here. *NLRB v. New-Southern Dyeing & Finishing, Inc.*, 444 F.2d 11, 16 (4th Cir. 1970). *See, also, Hotel, Motel & Restaurant Employees v. NLRB*, 785 F.2d 796, 799 (9th Cir. 1996).

In *New Associates*, the Third Circuit (the circuit, incidentally, in which Exxel operates its plant), like the D.C. Circuit, was confronted with the issue of whether to accept the NLRB's rationale in *Dresser*. After noting that the circumstances in *Dresser* and *Telautograph* were essentially the same, the court nevertheless, in deference to the Board, found that *Dresser* is a rational interpretation of the Act "*. . . but only in those situations where the employer has requested from the NLRB information on the percentage of employees who support the decertification petition and the NLRB has informed the employer that the percentage is less than a majority*". *NLRB v. New Associates, supra*, at 835. (Emphasis added.)

In adopting that rule, the Third Circuit pointed out, in essence, that it is illogical for the NLRB to hold that an employer may withdraw from bargaining if it receives a decertification petition signed by a majority of its employees, while at the same time refusing to provide an employer with the very information upon which he could make that determination. Thus the court said:

> We conclude that it follows logically that notification to the Board by a majority of unit employees should also constitute objective evidence of a lack of union majority

> support to the employer in the event that the employer learns of the percentage of support for the petition. With knowledge of majority support for the petition, the employer is justified in ceasing to bargain with the union.

Certainly, the NLRB cannot assert that in denying such information it is in any way protecting the interests of the employees involved. The NLRB was not asked by counsel for Exxel to disclose the names of those who had supported the petition (thus providing information as to those who had not). He simply asked whether the petition was supported by a majority of employees within the bargaining unit. (130a-131a) The question required only a yes or no answer. Had the NLRB responded in accordance with the rule of the Third Circuit, Exxel's position would have been clear. If supported by a majority of its employees, it would have been clearly justified in withdrawing recognition. If the answer had been in the negative, it would have known that it withdrew recognition at its own risk. Left in the dark, it could only act upon the information it had received within the plant.

II.

THE THIRD CIRCUIT'S RULE IS SOUNDLY ROOTED IN COMMON SENSE, AND SHOULD HAVE BEEN FOLLOWED BY THE D.C. CIRCUIT.

The existing split of authority between the District of Columbia Circuit and the Third Circuit poses an important question regarding the administration of the NLRA and the right of employees to petition for decertification.

This case vividly demonstrates why resolution of the conflict between the circuits concerning the doctrine of *New Associates* requires resolution by this Court. The respondent, Steelworkers, was recognized as the collective bargaining representative of Exxel's production and maintenance employees on September 7, 1990. *Recognition was voluntarily extended without the benefit of an election.* Four days after recognition was tendered (September 11, 1990) a petition signed by eight of Exxel's then fourteen employees asserted that they did not want to be represented by the Steelworkers

or any other union. The employer sought to have the Union's majority status tested in an NLRB-conducted election, but its petition was dismissed pending resolution of unfair labor practice charges filed by the Steelworkers. (70a; 77a) Protracted litigation before the NLRB and the court of appeals has left the employees of Exxel, *eight years later,* without access to the NLRB's representation procedures. Similarly, this employer, under *Dresser supra*, must continue to recognize and bargain with the Union although it suspects, but has no way of knowing for certain, that a majority of its employees no longer wish to be represented by the Steelworkers.

In January, 1995, Exxel employees again expressed their anti-union sentiment by sending to the NLRB statements signed by a number of employees, stating that they did not want union representation. (42a) By letter dated January 10, 1995, then counsel for Exxel notified the NLRB's Region 22 that Exxel had learned that a number of employees had approached the Region in an effort to decertify the Union, and consequently that the Company was postponing negotiations pending clarification of the matter. (118a-119a) *In the same letter counsel asked the Region whether the decertification petition was signed by at least 50% of Exxel's employees.* On January 26, 1995, the initial action taken by the Company's employees was followed by the filing of a formal petition for decertification. (4a; 122a-124a) *On January 30, 1995 Exxel's counsel again wrote to the Region, asking whether the employer's petition for decertification was supported by a majority of the bargaining unit.* (13a; 125a-129a) The Region denied the Employer's request, refusing to advise it whether the petition for decertification was supported by a majority of its employees — information which would have justified, under *Dresser,* withdrawal of recognition from the Union. The petition for decertification has never been acted upon and the employees of Exxel remain without the benefit of an election and under union representation which a majority of them may not desire.

Failure of this Court to resolve the conflict surrounding *New Associates* would leave our national labor policy in the incongruous position where, under these circumstances, an employer whose appeal is considered by the Third Circuit could lawfully withdraw

recognition, whereas the same employer or any employer whose decision is tested in the District of Columbia Circuit by doing so would be found guilty of an unfair labor practice requiring the continuation of unwanted representation and the denial of access to the NLRB's representation procedures.

It has yet to be determined how other circuits will address this issue. Some may be guided by the decision of the Third Circuit in *New Associates,* while others might follow the approach of the District of Columbia Circuit in this case. Thus, without definitive teaching by this court, the split among the circuits might widen and, for all practical purposes, employers will be left without any clear lawful vehicle to determine whether recognition and bargaining should continue pending the processing of a petition for decertification.[4] As the Third Circuit stated in *New Associates*:

> . . . Disclosure to an employer of majority support for decertification, if such should be the situation, meets the long-recognized Board position that the loss of such majority support warrants the employer's withdrawal of recognition of the union as the bargaining representative and justifies the scheduling of an election. On the other hand, if a majority of the employees have not joined in a petition, bargaining will continue. 35 F.3d at 834-35.

The Third Circuit went on to note that because the Regional Director must determine whether the petition is supported by thirty percent of the employees in order to proceed with a hearing and election, it appears that without any additional administrative costs he could also calculate whether over fifty percent of the employees advocate decertification. Further, as noted earlier, the NLRB may adequately protect the interests of employees by refusing to disclose

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4. In its decision the circuit court of appeals correctly noted that "an affirmative bargaining order and an order requiring an employer to cease and desist from refusing to bargain do not have the same consequences. Under settled Board practice only the former carries with it a decertification bar preventing the employer from challenging the Union's majority status for a reasonable period of time. *See, e.g., Exxel/Atmos II*, 28 F.3d at 1248; *Caterair*, 22 F.3d at 1121-22 & 4." (34a-35a)

the names of those supporting the petition. It should be required only to disclose whether the petition is supported by over fifty percent of the employer's employees. That rule should be uniform throughout the United States.

III.

THE COURT OF APPEAL'S DECISION AS TO THE APPLICATION OF § 10(e) OF THE NLRA RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT.

The Court of Appeals enforced the affirmative bargaining order in *Exxel II* even though it denied enforcement of the NLRB's findings as to the speech given by the Employer and the bonus given to its employees — the essential roots relied upon by the NLRB to support its decision. Citing this court's decision in *Woelke & Romero Framing Company v. NLRB*, 456 U.S. 645, 666 (1982), the circuit court then declared that Exxel had waived its right to question the NLRB's order because it had not raised the issue by way of a motion for reconsideration or rehearing pursuant to Section 10(e).

Initially, it should be observed that it is not at all clear that the NLRB would have issued a bargaining order, had it not erroneously found that the Company had unlawfully "instigated" the decertification petition and acted unilaterally in the granting of a Christmas bonus. In fact, it is evident from the Board's decision that its second order *(in Exxel II)* is inextricably entwined with its first *(Exxel I)*. Thus the Board stated:

> "Finally, even had we not determined in the *underlying Exxel/Atmos* case that the respondent was precluded from withdrawing recognition as a result of the affirmative bargaining order, we would find that the respondent could not lawfully withdraw recognition based on the January, 1995 decertification petition. Thus, that the petition is tainted because it was unlawfully instigated by the respondent in violation of Section 8(a)(1) and was circulated in the context of the respondent's unilateral

grant of the '$100 Christmas bonus', which violated Sections 8(a)(5) and (1)." (46a) (Emphasis added.)

Clearly, there is and was in the mind of the NLRB an essential linkage between its first (unenforced) bargaining order and the erroneously perceived violations of the Act thereafter.

Secondly, *Woelke & Romero* is inapplicable here. In *Woelke & Romero*, the petitioner asked the Court of Appeals to find that unions do not violate § 8(b)(4)(A) when they picket to obtain a subcontracting clause sheltered by the construction industry proviso. However, that issue was never raised before the NLRB. The Court of Appeals and this Court rightly concluded that the failure to raise this *substantive* issue, either at the initial hearing or in a petition for reconsideration or rehearing, amounted to a waiver under § 10(e) of the Act.[5] The Court of Appeals in this case has raised *Woelke & Romero* to a new plateau requiring a motion for rehearing or reconsideration with regard to the nature of *the order* issued by the NLRB even though the respondent before the NLRB has fully litigated all of the issues upon which that order is based. Clearly, *Woelke & Romero* was never intended to require such an unnecessary and fruitless extension of litigation.[6]

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5. Section 10(e) of the Act provides that "no objection that has not been urged before the Board . . . shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances". 29 U.S.C.A. § 160(e).

6. While the court of appeal's decision has its genesis in *Woelke & Romero*, which was decided by this Court in 1982, it nevertheless refused to enforce the NLRB's affirmative bargaining order in *Exxel I* and remanded *Exxel I* to the NLRB for an explanation of why that extraordinary remedy was necessary, even though Exxel had never specifically asked the NLRB to reconsider that order by way of motion for reconsideration or rehearing, as the court now demands. In essence, the question is: Why was *Woelke & Romero* applied in *Exxel II*, when it was not applied in *Exxel I*? Given that fact, how could counsel for Exxel have known that a motion for rehearing or reconsideration would be required to preserve the issue on appeal? Obviously not, because *Exxel I* and *Exxel II* are inextricably entwined, and one cannot and should not have been considered without the other.

Further, *Woelke & Romero* is not absolute and does admit of exceptions. In *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963 (10th Cir. 1990), Facet had raised in the circuit a due process issue which it had not presented to the NLRB. Nevertheless, the court held:

> Failure to object to the Board's action does not preclude judicial review when a motion for reconsideration would be an empty formality, not serving the purposes of notice, efficiency or providing the Board with first opportunity to consider an issue. 907 F.2d at 971-2.

Similarly, in *Oil, Chemical & Atomic Workers International Union v. NLRB*, 842 F.2d 1142 (9th Cir. 1988), the Ninth Circuit rejected a *Woelke & Romero* argument with regard to the issue of retroactivity. The court stated:

> The NLRB contends that the Union is precluded from arguing against the retroactive application of *Indianapolis* since it did not raise the issue before the Board. . . . This argument has been squarely rejected by both the Seventh and D.C. Circuits. *NLRB v. Wayne Transp., a Div. of Wayne Corp.*, 776 F.2d 745, 749 (7th Cir. 1985); *Local 900, International Union of Elec. etc. v. NLRB (Gulton)*, 727 F.2d 1184, 1193 (D.C.Cir. 1984). . . . Retroactivity is necessarily an issue anytime a new rule of law is formulated. This fact, combined with the Board's extensive experience with retroactivity problems, should have alerted the Board to the Union's likely objection to the retroactive application of their new rules of law. We adopt these decisions as Ninth Circuit law.

Similarly, in this case, considering Exxel's objection to the bargaining order in *Exxel I* and the court's remand, there is no question the NLRB was on notice that a renewed affirmative order in *Exxel II* would be subject to the same attack. As a matter of fact, in the NLRB's brief it devoted an entire point to the issue of whether the NLRB's affirmative order should be enforced. (132a-136a) How then could the NLRB claim surprise when it was obviously aware that the Order would be in issue? In fact, it did not claim surprise. The issue was raised by the

Steelworkers and by the District of Columbia Circuit itself, overlooking the fact that the issue of the bargaining order was a continuation of the remand order which remained unanswered by the NLRB.[7]

Rule 10(c) provides that in ruling upon a petition for certiorari, the Court will give consideration to the fact that a state court or United States Court of Appeals has decided an important question of federal law that has not been but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. This case satisfies both prongs of that criteria. The court has never ruled on whether § 10(c) should be applied to orders issued by the NLRB. Furthermore, the court of appeals has unjustly extended this Court's decision in *Woelke & Romero* to require a petition for rehearing or reconsideration directed to an Order of the NLRB even though all issues upon which that order is based have been fully litigated; and in this case, even though the unfair labor practices upon which the NLRB relied in issuing its order have been found not to have been committed.

Clearly, this employer is being forced to bargain under an affirmative bargaining order which would preclude the filing of a petition for decertification because it failed, in the view of the court of appeals, to take an unnecessary *procedural* step required not by common sense, but simply by that court's misinterpretation of *Woelke & Romero*. The issue, therefore, is one that may arise frequently in the administration of the NLRA and should be settled by this court.

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7. The District of Columbia Circuit's reliance upon *Quazite v. NLRB*, 87 F.3d 493, 497-98 (D.C.Cir. 1996) is distinguishable. Since *Quazite* stood alone, there was no *Quazite I* and *Quazite II*, as there is an *Exxel I* and *Exxel II*. Nor was there a previous affirmative bargaining order under attack. Secondly, *Quazite* is simply not good law or a valid extension of *Woelke & Romero* insofar as it would require a petition for reconsideration of the Board's order when all issues upon which that order is based have been fully litigated by respondent. It unduly foments unnecessary litigation.

CONCLUSION

Based upon the foregoing and the record as a whole, the court is urged to grant the petitioner's petition for certiorari as to both questions presented.

Respectfully submitted,

VINCENT J. APRUZZESE
Counsel of Record
FRANCIS A. MASTRO
APRUZZESE, McDERMOTT,
MASTRO & MURPHY
Attorneys for Petitioner
25 Independance Boulevard
P.O. Box 112
Liberty Corner, New Jersey 07938

Dated: September 30, 1998.

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA, DECIDED JUNE 26, 1998

EXXEL/ATMOS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

United Steelworkers of America, Intervenor.

Nos. 97-1417 and 97-1418.

United States Court of Appeals,

District of Columbia Circuit.

Argued April 9, 1998.

Decided June 26, 1998.

Rehearing Denied Aug. 26, 1998.

Employer petitioned for review and National Labor Relations Board (NLRB) cross petitioned for enforcement of orders issued in ongoing proceedings. The Court of Appeals, Randolph, Circuit Judge, held that: (1) the employer's president's speech about the procedures for decertifying the union was not coercive, nor did it promise any benefit, and, thus, the speech did not amount to an unfair labor practice,

even though the employer and president may have hoped that the employees would act on the information; (2) a Christmas bonus was not an element of "wages" and was not subject to collective bargaining; and (3) the employer's knowledge that some of its employees were seeking decertification did not excuse its failure to comply with an order directing it to bargain with the union where no decertification petition had been filed when the employer canceled all planned bargaining sessions with the union and where employer did not have clear evidence that a majority of its employees favored decertification.

Petition for review granted in part and denied in part; enforcement granted in part,

Sentelle, Circuit Judge, filed a concurring opinion.

See also, 28 F.3d 1243.

Vincent J. Apruzzese argued the cause and filed the briefs for petitioner.

David A. Fleischer, Senior Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were Linda Sher, Associate General Counsel, and Aileen A. Armstrong, Deputy Associate General Counsel. Margaret A. Gaines, Supervisory Attorney, entered an appearance.

Daniel M. Kovalik argued the cause for intervenor United Steelworkers of America. With him on the brief were Laurence Gold, David Silberman, and James Coppess.

Appendix A

Before: WALD, SENTELLE, and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge RANDOLPH.

Concurring opinion filed by Circuit Judge SENTELLE.

RANDOLPH, Circuit Judge:

These are petitions by Exxel/Atmos, Inc. to review, and cross-petitions by the National Labor Relations Board to enforce, two orders issued in June 1997. The Board issued the first of its orders on remand from our decision in Exxel/Atmos, Inc. v. NLRB, 28 F.3d 1243 (D.C.Cir.1994). The second order dealt with events in late 1994 and early 1995, after the remand.

Exxel is a small New Jersey company manufacturing nongas aerosol delivery systems. In September 1990 the company voluntarily recognized the United Steelworkers of America, AFL-CIO as the exclusive bargaining representative of its production and maintenance employees. Nine months later, in May 1991, Exxel refused the union's request to bargain. The Board found that Exxel had thereby violated § 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) & (5). See Exxel-Atmos, Inc. ("Exxel I"), 309 N.L.R.B. 1024, 1024, 1992 WL 390103 (1992). Among other things, it ordered Exxel to cease and desist from refusing to bargain with the union and affirmatively "to recognize, meet and bargain collectively in good faith" with the union upon request. Id. at 1024, 1033, 1992 WL 390103. This court upheld the Board's findings of violations of the Act and enforced the cease and desist order, but--on the basis of longstanding precedent in this circuit--we refused to enforce the bargaining order and

remanded the case to the Board for a "clear explanation" of "why a bargaining order, as opposed to the cease and desist order standing alone, was justified in this case." Exxel/Atmos, 28 F.3d at 1248-49; see Exxel/Atmos, Inc. v. NLRB, 37 F.3d 1538 (D.C.Cir.1994) (enforcing Board's order in part and remanding case in part).

The Board responded by reaffirming the bargaining order in a June 1997 supplemental decision. See Exxel-Atmos, Inc., 323 N.L.R.B. No. 159, 1997 WL 309321 (June 5, 1997). On the same date, the Board issued another decision and order finding the company guilty of additional unfair labor practices. On December 7, 1994, after our remand, Ronald Lemke, Exxel's President, gave a speech to the production and maintenance employees in which he explained the procedure for decertifying the union and informed the employees that Exxel was obligated to bargain with the union unless it was decertified. Exxel also gave each of its employees a cash Christmas bonus of $100 during the week of December 23. On January 10, Exxel, pointing to signed letters to the Board from some employees indicating that they no longer wished to be represented by the union, canceled all bargaining sessions with the union, then scheduled for early 1995. Employees filed a decertification petition on January 26, and thereafter Exxel took the position that it was under no obligation to bargain until a decertification election had been held. The Board concluded that Lemke's speech, the Christmas bonus, and Exxel's refusal to bargain violated § 8(a)(1) and (5) of the Act. See Exxel-Atmos, Inc. ("Exxel II"), 323 N.L.R.B. No. 158, slip op. at 3, 1997 WL 309318 (June 5, 1997). As a remedy, the Board again, inter alia, ordered Exxel both to cease and desist from refusing to bargain and affirmatively to bargain with the union upon request. See id.

Appendix A

I

We shall deal first with the Board's decision in Exxel II, and Lemke's speech. Employer speech or conduct violates § 8(a)(1) if it "interfere[s] with, restrain[s], or coerce[s] employees" in their decision whether to decertify the union. 29 U.S.C. § 158(a)(1). On the other hand, the "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice ... if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

The Board's explanation for finding a § 8(a)(1) violation in Lemke's speech consists of the following (323 N.L.R.B. No. 158, slip op. at 2, 1997 WL 309318):

> In his unsolicited speech, the Respondent's president, Lemke, provided the unit employees with instructions on how to decertify the Union. In doing so, the Respondent unlawfully instigated the decertification petition among its employees in violation of Section 8(a)(1) of the Act.*

The text tells us nothing. It merely recites the Board's conclusion that the speech was "unlawful." The Board's rationale, therefore, must be contained in the footnote suggesting that Lemke's speech was indistinguishable from the employer conduct condemned in Weisser Optical and "the cases cited therein."

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* Weisser Optical Co., 274 NLRB 961, 1985 WL 45835 (1985), and cases cited therein.

In Weisser Optical, the Board found a § 8(a)(1) violation because the company provided more than "ministerial aid" to its employees in filing a decertification petition. A company official had asked an employee to initiate and solicit signatures for a decertification petition among the rank-and-file, "explaining that he wanted to rid the [company] of the Union." 274 N.L.R.B. at 961, 1985 WL 45835. When the employee agreed, the official gave him a booklet containing instructions and sample language to be used in gathering evidence of employee interest. See id. The employee then apparently abandoned the idea, so management approached a second employee "about getting something started." Id. (internal quotation marks omitted). After a meeting at which the company expressed its belief that no "third party" was needed to work out any differences the employees might have with the company, the first employee immediately began soliciting signatures for a decertification petition. See id. The petition arrived at the Board only a few days later. See id. Such "unsolicited involvement with the showing of interest petition," held the Board, "constituted far more than ministerial aid" and hence violated § 8(a)(1) of the Act.

The "cases cited therein," in Weisser Optical that is, turn out to be only one case--Silver Spur Casino, 270 N.L.R.B. 1067, 1984 WL 36495 (1984).[1] There, the employer had suggested to

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1. Weisser Optical also contained citations to Texas Elec. Coop., 197 N.L.R.B. 10, 1972 WL 4491 (1972), and Craftool Mfg. Co., 229 N.L.R.B. 634, 1977 WL 8653 (1977). The Board cited those cases, however, not to explain when an employer violates § 8(a)(1) by assisting employees in filing a decertification petition, but rather to support its statement that reliance on a tainted decertification petition is no defense to a withdrawal-of-recognition charge. See Weisser Optical, 274 N.L.R.B. at 962, 1985 WL 45835.

an employee--at work and in phone calls to her at her home--that a decertification petition ought to circulate among the employees. See id. at 1071-72, 1984 WL 36495. The employer provided her with language to use in the petition, approved a draft, told the employee how to circulate it and among whom, gave her instructions on getting it signed and dated, and told her where to send it. See id. When a different employee approached the employer with concerns about a union, the employer provided similar assistance for a second petition. See id. at 1072, 1984 WL 36495. The employer then mailed both petitions to the Board. See id. The ALJ held that the employer's actions violated § 8(a)(1) because they "constitute[d] far more than the mere ministerial aid such as the Board might not find unlawful." Id. The Board upheld the ALJ's conclusion, stating that the employer "unlawfully encouraged and assisted the employees in repudiating the Union." Id. at 1067, 1984 WL 36495.

Neither Weisser Optical nor Silver Spur help to explain the Board's conclusion in this case. Whatever the precise meaning of "ministerial aid," neither decision goes so far as to hold that an employer violates § 8(a)(1) merely through statements informing employees of the decertification process. The Board explicitly rejected such a reading of § 8(a)(1) in Lee Lumber & Bldg. Material Corp., 306 N.L.R.B. 408, 1992 WL 41348 (1992). The employer there had called a meeting and pointed out the disadvantages of switching to a union-proposed pension plan. See id. at 408, 1992 WL 41348. In response to employee questions about how to get rid of the union, the employer gave the employees general information about the decertification process and the location of the Board's office, adding that any decertification petition "would have to be filed soon." Id. The Board thought the employer's

statements caused concern among the employees and triggered the filing of a decertification petition. See id. at 410, 1992 WL 41348. Even so, it held that this did not make the statements unlawful under § 8(a)(1). "It is clear that, under Section 8(c), an employer may lawfully furnish accurate information ... if it does so without making threats or promises of benefits.... Otherwise lawful statements do not become unlawful ... [under § 8(a)(1)] merely because they have the effect (intended or otherwise) of causing employees to abandon their support for a union." Id. at 409-10, 1992 WL 41348 (footnotes omitted). The employer's motive and the actual effect of its statements are irrelevant. See id. at 409, 1992 WL 41348. Instead, "the test is whether the employer's statements may reasonably be said to have tended to interfere with employees' exercise of their Section 7 rights." Id. (footnote omitted); see also Lucky 7 Limousine, 312 N.L.R.B. 770, 804, 1993 WL 402901 (1993).

Lemke's speech did not offend this standard. Lemke, and hence Exxel, doubtless intended to do more than merely make a public service announcement. It is fair to assume they hoped the employees would act on the information. But Lee Lumber makes the motivation of the employer irrelevant. As to the content of the speech, the part with which the Board took issue simply informed Exxel's employees that a decertification procedure existed for employees who decided they no longer wanted to be represented by a union.[2] For all we know, the

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2. The Board focused on the following portion of Lemke's speech:

> What if we don't want a union? Is there anything we can do about it? Yes. The Labor Board has a procedure called a Decertification Election. This would allow the employees to vote, in a secret ballot election, on whether you truly

(Cont'd)

employees were already aware of this. After briefly (and accurately) explaining the procedure, Lemke said that anybody "who wants more information ... can call the Labor Board to get more details about how to file for [a decertification] election." J.A. 61. He also left copies of the Board's address and phone number in the meeting room. Before concluding, Lemke told the employees, "The decision about whether to file a petition with the Labor Board for a Decertification Election is entirely up to you. The Company will not take any action against anyone because he has or has not signed a petition." J.A. 61. We presume the Board saw something coercive or threatening in these statements, but we are unable to detect anything of the sort. Unlike the employers in Weisser Optical and Silver Spur, who arguably pressured individual employees to participate in the decertification process, Lemke delivered his speech to Exxel's employees collectively. Moreover, his statements were remarkably similar to those in Lee Lumber, doubtless because an attorney for the company wrote the speech.

(Cont'd)

> want the union to represent you. The Board will conduct a Decertification Election if 30% of the employees take or send a petition to the Labor Board stating that they do not want the union to represent them. Anybody who wants more information about this procedure can call the Labor Board to get more details about how to file for an election. I will leave copies of the Labor Board's address and telephone number here in this room. I want to say as clearly as I possibly can that the Company intends to comply with the law and with the court's order [in Exxel I]. The decision about whether to file a petition with the Labor Board for a Decertification Election is entirely up to you. The Company will not take any action against anyone because he has or has not signed a petition. J.A. 61.

Short of saying nothing at all, it is hard to see how Lemke could have been more careful about not interfering with the employees' free choice and yet still informed them of the availability of the decertification procedure.

At any rate, since the Board chose not to explain why it believed the speech constituted "unlawful instigation," its citation to a clearly distinguishable precedent is not enough to warrant sustaining its conclusion that Exxel violated § 8(a)(1).

II

On the Wednesday or Thursday before Christmas 1994, each employee received from Exxel a $100 bill contained in a greeting card signed by Exxel's management. The Board, pointing out that the " 'Christmas bonus' was related to the increased sales performance of [Exxel's] employees in 1994," found that the bonus "constitutes wages, and as such, is a proper subject for collective bargaining." Exxel-Atmos, 323 N.L.R.B. No. 158, slip op. at 3, 1997 WL 309318. Exxel did not bargain with the union before awarding the bonus and so the Board concluded that the company violated § 8(a)(1) and (5). See id.[3]

The Board's conclusion lacks substantial evidence. The Act requires employers to bargain collectively with unions over

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3. Notably, the Board did not rest its conclusion that the Act was violated on a finding that Exxel presented the bonus with the intent of demonstrating to its employees "that the Union was irrelevant," or as part of a "concerted strategy to weaken and discredit the union in the eyes of the employees." Microimage Display Div. of Xidex Corp. v. NLRB, 924 F.2d 245, 253 (D.C.Cir.1991) (citation and quotation marks omitted). Such a finding would be subject to a very different analysis.

"wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). A "Christmas bonus ... becomes an element of wages and, therefore, a term and condition of employment that cannot be altered unilaterally" if it is "tied to other remuneration and paid regularly over an extended period." International Bhd. of Elec. Workers Local 1466 v. NLRB, 795 F.2d 150, 153 (D.C.Cir.1986). The bonus here was not tied to the wages of the employees. It was linked neither to seniority nor to each employee's individual performance. And, perhaps most telling, there is no evidence that Exxel had ever paid such a bonus to its employees in the past. See id. (Christmas bonus found to be "a part of the employees' wages" where it was "a regular practice going back some forty years"); 5 THEODORE KHEEL, LABOR LAW § 19.04, at 19-18 to -19 (1997) (cases finding bonuses to be wages "have primarily relied on the regularity of the payment over a sufficient period of time"); Sykel Enters., Inc., 324 N.L.R.B. No. 171, slip op. at 3-4, 1997 WL 704931 (Nov. 7, 1997) (crucial question in determining whether Christmas bonus constitutes wages is whether employer's pattern of paying bonus in past has justified employees' expectations that they could count on receiving it as part of wages in future as well).

In short, the record plainly shows that the bonus was a seasonal gift. The previous Christmas, Exxel had hosted a buffet luncheon party for its employees. The next year it gave them cash because it was the first year Exxel had turned a profit. That did not transform the $100 bonus into "an integral part of [Exxel's] wage structure." Niles-Bement-Pond Co., 97 N.L.R.B. 165, 166-67 (1951).

Appendix A

III

This brings us to Exxel's refusal to bargain with the union in early 1995. In enforcing the Board's cease and desist order in Exxel I, we ordered Exxel to "[c]ease and desist from ... [w]ithdrawing recognition from and refusing to meet and bargain collectively with" the union. Exxel/Atmos, Inc. v. NLRB, 37 F.3d 1538 (D.C.Cir.1994) (enforcing Board's order in part and remanding case in part). It was "utterly clear" that our order put Exxel under an affirmative obligation to bargain with the union as of November 30, 1994, the date our mandate issued. Caterair Int'l v. NLRB, 22 F.3d 1114, 1123 (D.C.Cir.1994).[4] Even so, Exxel did next to nothing. It held no bargaining sessions with the union in the weeks leading up to January 10. And when on that date Exxel learned of an impending decertification effort on the part of some of its employees--it is unclear whether Exxel knew exactly how many employees supported the effort, but it is clear that no decertification petition had been filed at that time--it promptly canceled all planned bargaining sessions with the union, including one scheduled for the next day. We acknowledge that under some circumstances an employer may suspend bargaining if it "can show, by 'clear, cogent and convincing' evidence, either that the union has lost majority support or that the employer has a reasonable, goodfaith doubt of continuing majority support." Microimage Display Div. of Xidex Corp.

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4. An affirmative bargaining order and an order requiring an employer to "cease and desist" from refusing to bargain do not have the same consequences. Under settled Board practice, only the former carries with it a decertification bar, preventing the employer from challenging the union's majority status for a reasonable period of time. See, e.g., Exxel/Atmos, 28 F.3d at 1248; Caterair, 22 F.3d at 1121-22 & n. 4.

v. NLRB, 924 F.2d 245, 253 (D.C.Cir.1991) (citation omitted). We also recognize that Exxel twice requested by letter, once on January 10 and again on January 30, that the Board inform it whether a majority of Exxel's employees had petitioned for decertification, and that the Board refused the request. But none of this excused Exxel from complying with our order. Exxel should have bargained with the union as soon as was practically possible following the issuance of our mandate. At the very least, it should have gone ahead with the scheduled bargaining sessions until January 26, when a formal decertification petition was filed. See, e.g., St. Agnes Med. Ctr. v. NLRB, 871 F.2d 137, 146 (D.C.Cir.1989); Allied Indus. Workers, Local Union No. 289 v. NLRB, 476 F.2d 868, 881 (D.C.Cir.1973); NLRB v. New Assocs., 35 F.3d 828, 833-35 (3d Cir.1994). Exxel's refusal to do so constituted a direct violation of our order and hence was clearly unlawful.

As a remedy for Exxel's recalcitrance, the Board once again issued a bargaining order. Relying on our decision in Exxel I, the company argues that the Board failed to justify the bargaining order. But there is an essential difference between the two cases: here, Exxel never contested the propriety of the bargaining order in the proceedings before the Board. Accordingly, under § 10(e) of the Act, Exxel waived any right it had to object to the order before this court. See 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board ... shall be considered by the court...."); Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 666, 102 S.Ct. 2071, 72 L.Ed.2d 398 (1982) (failure to "object[ ] to the Board's decision in a petition for reconsideration or rehearing ... prevents consideration of the question by the courts"); Quazite v. NLRB, 87 F.3d 493, 497-98 (D.C.Cir.1996) (refusing to consider employer's argument that Board did not adequately explain

need for bargaining order because employer did not raise objection before Board). It is of no moment that the Board neglected to invoke § 10(e) in its brief to this court. Section 10(e) "speaks to courts, not parties," and the Board cannot waive its jurisdictional requirements simply by neglecting to mention them before us. EEOC v. FLRA, 476 U.S. 19, 23, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986) (per curiam).[5]

The petition for review in No. 97-1417 is granted in part and denied in part. Enforcement of the Board's order is denied on the speech and bonus questions in No. 97-1417. The remainder of the Board's order in No. 97-1417 is enforced. The petition for review in No. 97-1418, and the Board's cross-application for enforcement, are dismissed. See note 5, supra.

So ordered.

SENTELLE, Circuit Judge, concurring:

I join without reservation in the Court's conclusion that under section 10(e) of the Act, 29 U.S.C. § 160(e), we lack jurisdiction to review the second bargaining order. I write separately to express my hope (probably a vain one) that the Board will not find in our declining any suggestion that we consider the reasoning in its supplemental opinion adequate to

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5. Because we enforce the Board's June 5, 1997, bargaining order in Exxel II, there is no need for us to consider whether the Board's supplemental opinion adequately supported the original bargaining order issued by the Board in Exxel I. The two bargaining orders are effectively identical.

support the extraordinary remedy invoked in its original bargaining order in Exxel/Atmos, Inc. v. NLRB, 28 F.3d 1243 (D.C.Cir.1994). In Exxel, we reiterated to the Board the well established law of this Circuit that the issuance of a bargaining order is an extraordinary, "somewhat punitive," remedy which "has the effect of ensconcing the union as the employees' exclusive bargaining representative and therefore carries with it the potential of infringing upon employees' Section 7 rights." 28 F.3d at 1248 (citing Caterair Int'l v. NLRB, 22 F.3d 1114, 1122 (D.C.Cir.1994)). Therefore, "we have time and again required the Board to explain that it has balanced the often competing interests of union protection and employee choice before issuing a bargaining order." Exxel, 28 F.3d at 1248 (citing, inter alia, Caterair, 22 F.3d at 1123). On remand, instead of complying with its duty to balance, the Board, continuing in the rogue behavior which we have noted time and again, simply declared the appropriateness of its original remedy, incredibly stating as its sole basis its prior decision in Caterair Int'l, 322 N.L.R.B. No. 11, 1996 WL 514512 (Aug. 27, 1996).

Lest there be any doubt, the Board's Caterair is the very decision which we reversed, noting that we were ordering the Board for the sixth time to cease engaging in its contumacious behavior. See Caterair, 22 F.3d at 1123. Once again, our orders and admonitions to the Board seem to have fallen on deaf ears. Not only does it continue to engage in precisely the process we have condemned in the past, but even cites in support of this recalcitrant behavior the Caterair decision for which we condemned it.

As I have previously suggested, I think we have been overly gentle in our line of cases, including Caterair, rejecting the Board's facile imposition of the extraordinary bargaining orders

remedy. See Lee Lumber & Bldg. Material Corp. v. NLRB, 117 F.3d 1454, 1463-64 (D.C.Cir.1997) (Sentelle, J., concurring). In no other area of our enlightened democratic society would we permit an elitist bureaucracy to deprive citizens of their rights as free actors on the theory that they might have been so deceived by others of differing interests that they cannot by their free choice determine their best interests, but must be subjugated to the decision of an administrative agency. Id. While we can conceive of a commission regulating corporations tossing out the election of a corporate board based on deceit practiced against the shareholders, no one has ever suggested that such a commission could then impose indefinitely on the shareholders an unelected board, on the rationale that shareholder votes thereafter would be the product of "tainted" decisionmaking. We might even imagine an election of a public official being overturned because of fraud, but it is surely inconceivable that a board or commission could then impose its own choice of congressman, senator, or governor because of some continuing taint. Nonetheless, the NLRB persists in its elitist belief that those of the working class cannot be trusted to reject deceit on their own, and that, therefore, their benevolent big brother must watch after them.

Were we not bound by stare decisis, I would find few if any circumstances under which I would uphold a bargaining order. However, I recognize that this Court is bound by precedent. The time has long since come for the Board to recognize not only the constraints of precedent, but its statutory and constitutional duty to obey the law as interpreted by the courts. Under 29 U.S.C. § 160, this Court has jurisdiction to review the orders of the Board. On at least seven occasions we have exercised that jurisdiction to tell the Board that its routine

imposition of remedial bargaining orders is contrary to law. See cases collected in Lee Lumber, 117 F.3d at 1461; Exxel, 28 F.3d at 1248. Eight is enough.

APPENDIX B — ORDER OF UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA, DATED DECEMBER 14, 1995

IN RE EXXEL/ATMOS, INC.,

Petitioner.

No. 95-1278.

United States Court of Appeals,
District of Columbia Circuit.

Dec. 14, 1995.

Before: SILBERMAN, SENTELLE, and RANDOLPH, Circuit Judges.

ORDER

PER CURIAM.

Upon consideration of the petition for a writ of mandamus, it is

ORDERED that the petition be denied. Petitioner has not demonstrated a clear and indisputable right to the writ. See Gulfstream Aerospace Corp. v Maycamas Corp., 485 U.S. 271, 289 (1988); Reynolds Metals Co. v. FERC, 777 F.2d 760, 762 (D.C. Cir. 1985).

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA, DATED NOVEMBER 4, 1994

EXXEL/ATMOS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 93-1108.

United States Court of Appeals,
District of Columbia Circuit.

Nov. 4, 1994.

Petition for Review of an Order of the National Labor Relations Board.

Before: EDWARDS, Chief Judge, WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, Circuit Judges.

ON RESPONDENT'S SUGGESTION FOR REHEARING EN BANC

ORDER

PER CURIAM.

Appendix C

Respondent's Suggestion for Rehearing En Banc and the Response thereto have been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the Court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

Chief Judge EDWARDS and Circuit Judge SILBERMAN would grant the suggestion.

A dissenting statement filed by Circuit Judge SILBERMAN is attached.

SILBERMAN, Circuit Judge, dissenting from the denial of rehearing en banc:

Ordinarily I would not vote to vacate an opinion of this court and to set the case for en banc argument if the opinion merely remanded to the agency for an adequate explanation. I have noted, however, that such an order should be limited to situations where the court is genuinely uncertain as to the agency's legal/policy course. See United States Office of Personnel Management v. FLRA, 905 F.2d 430, 437 (D.C.Cir.1990) (Silberman, J., concurring) ("[W]e must take care not to cajole agencies, through remand for inadequate explanations, into adopting legislative interpretations we lack authority to require."). In this situation we are not uncertain; the court quite obviously just disagrees with the Board's policy. By repeatedly, if episodically, refusing to enforce Board bargaining orders, unless and until the Board articulates limits

on those orders that the court believes desirable, the court has exceeded--rather dramatically in my view--the legitimate scope of judicial review. Compare, e.g., Sullivan Indus. v. NLRB, 957 F.2d 890, 904-05 (D.C.Cir.1992)and Williams Enters., Inc. v. NLRB, 956 F.2d 1226, 1235 (D.C.Cir.1992) with NLRB v. Creative Food Design Ltd., 852 F.2d 1295, 1299 (D.C.Cir.1988). And since under the National Labor Relations Act employers throughout the country may petition for review in the D.C. Circuit, the court's posture absolutely prevents the Board from pursuing its policy even though our sister circuits are more deferential. See, e.g., Louisiana- Pacific Corp. v. NLRB, 858 F.2d 576, 578-79 (9th Cir.1988); NLRB v. Hollaender Mfg. Co., 942 F.2d 321, 327-28 (6th Cir.1991), cert. denied, 502 U.S. 1093, 112 S.Ct. 1168, 117 L.Ed.2d 414 (1992).

The Board's position is rather straightforward. If an employer violates § 8(a)(5) of the Act by illegally refusing to bargain with a union that the employer has previously formally recognized as the representative of a majority of its employees, the employer will be ordered to bargain with the union. Such a bargaining order obliges the employer to bargain in good faith for a reasonable period of time.

> For over 50 years, an affirmative bargaining order has been the standard Board remedy for an employer's unlawful refusal to bargain with a union which, as of the date of the refusal, enjoys the status of a 9(a) collective- bargaining representative. See, e.g., Inland Steel Co., 9 NLRB 783, 814- 816 (1938). This remedy is warranted even if the union has lost its majority support after the unfair labor practice and even though the order will operate to preclude, for a reasonable period, an election to test majority

> status. In such cases, the Board's paramount concerns are to restore to the union the bargaining opportunity which it should have had in the absence of unlawful conduct and to prevent the possibility that the wrongdoing employer would ultimately escape its bargaining obligation as the result of the predictably adverse effects of its unlawful conduct on employee support for the union.

Williams Enters., Inc., 312 N.L.R.B. 937, 940, 1993 WL 402910 (1993).

Going back to Peoples Gas Sys., Inc. v. NLRB, 629 F.2d 35 (1980), this court has been uncomfortable with such orders because it has thought that employees should have an early opportunity (presumably, earlier than what the Board might ex post conclude was a reasonable period of time) to initiate a decertification election, or that an employer should be able readily to force the union to petition for an election to reaffirm its majority status. I have explained in my dissenting opinion in Sullivan Indus. v. NLRB, 957 F.2d 890, 906 (D.C.Cir.1992) (Silberman, J., concurring in part and dissenting in part), that Peoples Gas misread NLRB v. Gissel Packing Co., 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), a Supreme Court decision which deals only with the propriety of bargaining orders employed in the unusual situation where a union has not been recognized. The court, I am afraid, continues to labor under the misreading; Peoples Gas is once again relied upon in this case. The premise, accordingly, upon which in this case the court remands to the Board--that a bargaining order is an unusual remedy for an illegal refusal to bargain, even when an employer has previously recognized the union--is simply not correct.

Appendix C

The panel's opinion suggests a rationale upon which it is prepared to enforce the Board's order, but it is a rationale that would compel the Board-- improperly in my view--to set a boundary on what is a reasonable period in this case and to forswear the use of a bargaining order in other cases not before the court. The court recognizes that the illegal refusal to bargain took place only eight months after the union was recognized. A union is normally entitled under Board precedent to an irrebuttable presumption of majority support during the first year after achieving representative status, and the court suggests that the order would be enforced in this case if the Board were to define a reasonable period of time to mean only four months. But when an employer illegally refuses to bargain during the first year after recognizing a union, the employer's unfair labor practice itself presumably contributes to eroding employee support for the union. If a Board order to bargain is applicable only for a period that corresponds to the period remaining in the first year when the unfair labor practice was committed, an employer would thus still have an incentive to engage in illegal conduct.

The corollary to the court's position, which follows our line of cases since Peoples Gas, is that the Board may not issue an order requiring an employer to bargain with a union for a reasonable period of time (which also forecloses an employee decertification election during that period) if the illegal refusal to bargain takes place more than a year after the employer recognized the union. The Board, not surprisingly, refuses to accept the court's view of desirable policy. The Board may be unwilling to spell out ex ante what is a reasonable period of time in such situations because subsequent events may bear on the issue. The Board may also be concerned, however--not unlike Presidents faced with demands for time limits on the

deployment of U.S. troops--that a specified period will provide an incentive to the employer to wait out the period rather than reach a possible agreement.

We have said repeatedly in the Peoples Gas line of cases that the Board has not, to our satisfaction, balanced the interests of employees who wish to be rid of their union (and employers who perhaps also wish to be free of the union) with the Board's desire to return a union back to the position it would have occupied but for the unfair labor practice. As I argued in Sullivan, however, an agency is entitled to enormous deference when it chooses the appropriate remedy to redress a violation of law. See National Treasury Employees Union v. FLRA, 910 F.2d 964, 966-67 (D.C.Cir.1990) (en banc); see also Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 201-02, 111 S.Ct. 2215, 2222-23, 115 L.Ed.2d 177 (1991). For its part, the Board has taken the position that an order to bargain is the appropriate remedy for all § 8(a)(5) violations. If I were a Board member I might well be sympathetic to a somewhat different policy, but I do not believe that we have any judicial warrant to object to the Board's categorical approach or its refusal to spell out ex ante the temporal limits on a bargaining order.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT DECIDED JULY 15, 1994

EXXEL/ATMOS, INC.,

Petitioner,

-v.

NATIONAL LABOR RELATIONS BOARD.

No. 93-1108.

United States Court of Appeals,
District of Columbia Circuit.

Argued April 11, 1994.

Decided July 15, 1994.

Employer sought judicial review of National Labor Relations Board (NLRB) decision finding that it committed unfair labor practices against union and ordering employer to cease and desist from unfair labor practices and to bargain with union upon request. The Court of Appeals, Mikva, Chief Judge, held that: (1) evidence supported finding that employer's new president refused to bargain with union after his predecessor had, within prior year, voluntarily recognized union and, thus, employer committed unfair labor practice by refusing to bargain, and (2) it would remand case to Board to explain why Board's ordering of employer to bargain with union, rather than cease and desist order alone, was justified.

Petition denied in part, case remanded in part.

Appendix D

Francis J. Connell, III, Philadelphia, PA, argued the cause and filed the briefs, for petitioner.

Paul J. Spielberg, Deputy Asst. Gen. Counsel, N.L.R.B., Washington, DC, argued the cause, for respondent. With him on the brief were Linda Sher, Acting Associate Gen. Counsel, N.L.R.B., Aileen A. Armstrong, Deputy Associate Gen. Counsel, and David Seid, Attorney, N.L.R.B., Washington, DC.

Before: MIKVA, Chief Judge, BUCKLEY and RANDOLPH, Circuit Judges.

Opinion of the Court filed by Chief Judge MIKVA.

MIKVA, Chief Judge:

Exxel/Atmos, Inc. ("Exxel" or "Company") seeks review of an order of the National Labor Relations Board ("NLRB" or Board") finding that it committed unfair labor practices against District 9 of the United Steelworkers of America, AFL-CIO ("Union"). Adopting the findings of an Administrative Law Judge ("ALJ"), the Board determined that Exxel's President refused to bargain with, and withdrew recognition from, the duly recognized Union in violation of sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(a)(1) and (5). The Board issued an order requiring the company to cease and desist from all unfair labor practices and compelling it to bargain with the Union at the latter's request. We uphold the Board's unfair labor practice finding and its decision not to sponsor an election. However, we remand the case to allow the Board to explain why an affirmative bargaining order, as opposed to the cease and desist order alone, is the appropriate remedy for Exxel's refusal to bargain with the Union.

Appendix D

I. BACKGROUND

Exxel/Atmos is a New Jersey corporation that manufactures and distributes non-aerosol dispensing containers. In the summer of 1990, the Union began an organizing campaign at the Company's Somerset, New Jersey facility. By mid-August it had obtained certification cards from a majority of Exxel's nineteen production and maintenance workers. Realizing that a majority of the employees supported the Union, Exxel's then-President, Peter Gould, faxed a letter to Union officials on September 7, 1990 recognizing the Union as the exclusive representative of a bargaining unit consisting of the Company's production and maintenance workers. The Union accepted Exxel's recognition, and the parties agreed to convene a negotiation meeting on September 12. Later on September 7, however, Exxel laid off five bargaining unit employees, including several of the Union's leading supporters. The Union responded by canceling the September 12 negotiation; the next day it filed an unfair labor practice complaint against the Company with the NLRB. Between September 13, 1990 and May 7, 1991, with the complaint pending, neither party attempted to contact the other regarding negotiations or for any other reason.

In early May, the Union learned that the Board planned to dismiss its unfair labor practice complaint. As a result, on May 7, 1991, Union representative Daniel Applegate contacted Bob Shiels, Exxel's newly installed President, about rescheduling the negotiation session. In what would prove to be a pivotal telephone conversation, Shiels informed Applegate that he would meet with Applegate individually to discuss "where we were," but that no formal negotiations would take place until the employees voted for Union representation in a Board-sponsored election. While acknowledging that his

predecessor had voluntarily recognized the Union, Shiels stated that he "felt firmly" that the employees should have the opportunity to select their own bargaining representatives. Applegate responded that an election was unnecessary because the Company had already recognized the Union, and he declined Shiels' invitation to meet one-on-one. Shiels and Applegate had a substantially similar conversation on July 17, 1991.

Upon learning of the possibility that the Company would bargain with the Union, William O'Donnell, an Exxel supervisor, revealed to the Company's Vice- President on July 24, 1991 an anti-Union petition he had circulated during the Union's initial membership drive. At the time he circulated the petition, O'Donnell was a member of the bargaining unit. The petition bore the signatures of eight bargaining unit members (including O'Donnell's), and the date September 11, 1990 appeared next to each signature. Management was not previously aware of the petition. The next day, July 25, 1991, the Company posted the following inter-office memorandum:

> TO: All Shop Personnel
> FR: Bob Shiels
> DATE: July 25, 1991
> RE: UNITED STEEL WORKERS UNION
>
> We want to let you know of recent events concerning the United Steelworkers Union.
>
> We have received a letter from the union demanding that we bargain and negotiate a contract that would establish your wages, hours and working conditions.
>
> However, we have also learned that a number of

> you signed a petition in September, stating that you do not want union representation.
>
> We really believed, when we recognized the Union, that a majority of you wanted the Union. However, in light of this petition, we are not sure what to do. We plan soon to make the right decision for all concerned.
>
> If you have any questions, please feel free to ask [Company management].

After a number of employees (it is disputed exactly how many, but not more than six) voiced opposition to the Union, Exxel informed the Board that it no longer believed the Union represented a majority of the workers in the bargaining unit and requested a Board-sponsored election. The Union then filed this complaint.

After a two-day hearing, an ALJ concluded that Exxel violated sections 8(a)(1) and (5) of the NLRA by refusing to bargain with, and withdrawing recognition from, the Union. The ALJ found that Shiels' statements in his May 7 telephone conversation with Applegate evinced a refusal to bargain with the Union and that such refusal constituted an unfair labor practice because a reasonable time for bargaining had not elapsed in the period between September 7, 1990, when the Union canceled the originally scheduled bargaining session and May 7, 1991, when it renewed its request for bargaining. The ALJ also noted that the employee petition was irrelevant to his determination because it came to management's attention only after Shiels' refusal to bargain on May 7, 1991.

Appendix D

Moving to remedial issues, the ALJ ordered Exxel to cease and desist from refusing to bargain and interfering with its employees in the exercise of their right to choose a bargaining representative under Section 7 of the NLRA. In addition, the ALJ ordered Exxel to recognize and bargain with the Union at the latter's request as the exclusive collective bargaining representative of the employees in the unit. On December 16, 1992 the Board adopted the ALJ's substantive conclusions and remedies with only minor modifications, and this petition followed.

II. DISCUSSION

Petitioner challenges the ALJ's finding that Bob Shiels withdrew recognition from and refused to bargain with the Union in the course of his May 7 conversation with Daniel Applegate. Exxel also contends that even if it did commit an unfair labor practice on May 7, the Board's order requiring the Company to bargain with the Union is an unwarranted intrusion upon the rights of its employees to select a bargaining representative of their own choosing. We address these arguments in turn after first setting forth the governing law and relevant standards of review.

A. Governing Law and Standard of Review

The law governing an employer's obligation to bargain with a union it has voluntarily recognized is well established. "The employer is not required to recognize a union on the basis of a majority card showing and has the option to insist on an election." NLRB v. Creative Food Designs, Inc., 852 F.2d 1295, 1297 (D.C.Cir.1988) ("Creative Food"). If the employer chooses voluntarily to recognize the union, however, it is bound

by that recognition and may no longer seek an election. Id. Once recognized, the union enjoys a presumption of continuing majority support. Id. at 1300. For a reasonable time after voluntary recognition, usually one year, that presumption is irrebuttable; after the one-year grace period, the employer may attempt to rebut the presumption of majority support by presenting to the Board " 'clear, cogent, and convincing evidence, that the union was in the minority or that the employer had a good faith reasonable doubt of majority support at the time of the refusal [to bargain].' " Id. (quoting NLRB v. Tahoe Nugget, 584 F.2d 293, 297 (9th Cir.1978), cert. denied, 442 U.S. 921, 99 S.Ct. 2847, 61 L.Ed.2d 290 (1979)).

The scope of our review of NLRB decisions is quite limited. We must uphold the Board's factual findings so long as they are supported by substantial evidence on the record considered as a whole. See 29 U.S.C. § 160(e) (1988); Sullivan Indus. v. NLRB, 957 F.2d 890, 894 (D.C.Cir.1992). Additionally, "we must accept the ALJ's credibility determinations, as adopted by the Board, unless they are patently insupportable." Creative Food, 852 F.2d at 1297. Finally, we owe particular deference to the Board's choice of remedy. See NLRB v. Gissel Packing, 395 U.S. 575, 612 n. 32, 89 S.Ct. 1918, 1939 n. 32, 23 L.Ed.2d 547 (1969) ("In fashioning its remedies under the [NLRA], the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.").

B. Withdrawal of Recognition and Refusal to Bargain

With these clear standards in mind, we first review petitioner's contention that the record lacks substantial evidence to support the ALJ's finding that Bob Shiels, in his May 7

telephone conversation with Daniel Applegate, refused to bargain with and withdrew recognition from the voluntarily recognized Union. Initially, the Company cannot attack the ALJ's finding that a reasonable time for bargaining had not elapsed between Exxel's voluntary recognition of the Union in September, 1990 and the May 7 Shiels/Applegate conversation because that eight-month period falls well within the one-year window within which a voluntarily recognized union enjoys a conclusive presumption of continuing majority support. Accordingly, the heart of Exxel's challenge to the ALJ's unfair labor practice finding is that Shiels did not in fact refuse to bargain with the Union on May 7.

We hold, however, that substantial evidence supports the ALJ's finding. Petitioner attempts to paint Shiels as the cautious new executive who prudently sought to avoid rushing headlong into union negotiations without first becoming familiar with all the issues involved. The Company thus argues that in the May 7 telephone conversation Shiels did not refuse outright to bargain with the Union. Instead, according to the Company, he intended merely to convey that he was unprepared to bargain with the Union "at that time" because he had not yet had the opportunity to confirm that his employees desired the Union's representation.

Being new on board and never having dealt with the Union, Shiels' caution is understandable. But Shiels' own testimony before the ALJ belies any suggestion that he meant only to postpone negotiations until he had familiarized himself with the issues. Shiels did not say only that he wanted to postpone bargaining until he was satisfied that his employees supported the Union; rather, he made clear that he desired an election before proceeding to negotiate with the Union. In response to

the ALJ's question, "And you recall . . . telling [Applegate] that you wanted an election?," Shiels replied, "That's my clear recollection. . . . I wanted to be sure there was an election." Based on this and similar testimony, the ALJ inferred reasonably that Shiels refused to negotiate with, or to recognize, the Union as the employees' bargaining representative "unless and until" an election was held. And, as we stated above, an employer who has previously recognized a union is not entitled to an election absent a reasonable passage of time. We therefore uphold the ALJ's findings, as adopted by the Board, that Exxel violated Sections 8(a)(1) and (5) of the NLRA.

C. The Bargaining Order

The appropriateness of the Board's bargaining order presents a more difficult question. The ALJ's remedy in this case consisted of two orders. The first requires Exxel to cease and desist from refusing to bargain with the Union and from interfering with its employees' rights to choose a bargaining representative. The second compels the Company affirmatively to bargain with the Union at the latter's request. The Board adopted both remedies in full with no explanation.

Pointing to evidence that a number of past and present members of the bargaining unit have voiced opposition to the Union, Exxel asks that the Board's affirmative bargaining order be set aside in favor of an election because it infringes upon its employees' rights under Section 7 of the NLRA "to form, join, or assist labor organizations [and] to bargain collectively through the representative of their own choosing." 29 U.S.C. § 157. At a minimum, the Company asserts, the Board should be made to explain why the bargaining order is the appropriate cure for the Company's unfair labor practice.

Appendix D

Initially, we reject the Company's contention that the Board abused its discretion by not ordering an election. As we explained in NLRB v. Creative Food Design, 852 F.2d 1295 (D.C.Cir.1988), by voluntarily recognizing a union an employer waives its prerogative to insist upon an election. Id. at 1299. The company thereby agrees in effect to treat the union as if it had won an election and to afford the union all the benefits that accompany full representational status. Chief among those benefits is a conclusive presumption of continuing majority support for one year after voluntary recognition. Thus, by unlawfully refusing to negotiate with the Union absent an election only eight months after recognition, Exxel violated its promise to respect the desires of a majority of its employees and to allow the Union a reasonable time to negotiate. Because Exxel was not at liberty to request an election at that time, ordering an election after the fact would grant the Company an option to which it was not entitled when it committed the unfair labor practice. Such a result would allow employers to circumvent the one-year presumption simply by calling for an election within that year and then presenting to the Board some evidence of an erosion of majority support. As this outcome would be inconsistent with the purposes of the NLRA, we uphold the Board's conclusion that Exxel was not entitled to an election.

We must still decide, however, whether the Board erred in not explaining why a bargaining order, as opposed to the cease and desist order standing alone, was justified in this case. Although it might appear redundant to require a company simultaneously to cease refusing to bargain and to bargain upon request, the Board has attached different legal and practical consequences to the two orders. See Caterair Int'l v. NLRB ("Caterair"), 22 F.3d 1114, 1121-22 (D.C.Cir.1994). Cease and

desist orders are remedial; they require only that the employer "conform his conduct to the norms set forth in the Act." International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 740, 81 S.Ct. 1603, 1608-09, 6 L.Ed.2d 762 (1961). Bargaining orders, in contrast, have a somewhat punitive aspect because under longstanding Board practice they are accompanied by a decertification bar that prevents employees from challenging the union's majority status for a reasonable period of time. Sullivan Industries v. NLRB, 957 F.2d 890, 903 (D.C.Cir.1992). While in some circumstances the decertification bar may be necessary to insulate a fragile union from employer interference, it also has the effect of ensconcing the union as the employees' exclusive bargaining representative and therefore carries with it the potential of infringing upon employees' Section 7 rights. Caterair, 22 F.3d at 1122. Due to the added imposition of the decertification bar, we have time and again required the Board to explain that it has balanced the often competing interests of union protection and employee choice before issuing a bargaining order. See, e.g., Caterair, 22 F.3d at 1123; Sullivan Industries, 957 F.2d at 903-04; Williams Enterprises v. NLRB, 956 F.2d 1226, 1237 (D.C.Cir.1992); Avecor, Inc. v. NLRB, 931 F.2d 924, 934-35 (D.C.Cir.1991); Peoples Gas Sys., Inc. v. NLRB, 629 F.2d 35, 45-47 (D.C.Cir.1980).

A strong argument can be made that the Board's decision to impose a bargaining order was justified because Exxel's refusal to bargain occurred during the first year of voluntary recognition. Unlike cases in which an unfair practice occurs after the first year, imposing merely a cease and desist order in first year refusal cases does not return the parties to status quo. Cf. Caterair, 22 F.3d at 1122 (noting that the cease and desist order is a "sound third option" to an election and bargaining

order because it mandates a return to the status quo). The cease and desist order requires the offending company to bargain, but it does so in a context outside the protective range of the one- year conclusive presumption. In such a setting, but not in the first year, the company (or its anti-union employees) would be entitled to question the union's majority status, and thus would be in a more favorable position vis-a-vis the union as compared to before it committed the unfair labor practice. As such, the decertification bar (provided its duration is substantially tailored to restore to the union that part of the one-year period that was denied it by the company's unfair labor practice) simply affords the union the same protection it rightfully enjoyed during its first year. See Brooks v. NLRB, 348 U.S. 96, 104, 75 S.Ct. 176, 181-82, 99 L.Ed. 125 (1954) (upholding Board policy of barring decertification petitions filed within one year of certification); 1 HARDIN, THE DEVELOPING LABOR LAW 390 (3d ed. 1992) ("To foster collective bargaining and stabilize industrial relations, the Board has long required that in the absence of unusual circumstances a certified union's majority status must be honored for 1 year; and a [decertification] petition filed during the 1-year period will ordinarily be barred."). In other words, not imposing the bargaining order in first year refusal cases would permit the company, by committing an unfair labor practice in the first year, to frustrate the core purpose of the protective period. Such a result would actually encourage unfair labor practices by companies that during the first year become dissatisfied with the Union or the legally required bargaining process.

But no matter how persuaded we may be by the policy arguments favoring the imposition of bargaining orders in first year refusal cases, it is not for us to apply those rationales to a

particular case — at least not in the first instance. It is up to the Board, not the courts, to make labor policy. See Amalgamated Clothing and Textile Workers v. NLRB, 736 F.2d 1559, 1566 n. 5 (D.C.Cir.1984) ("Because requiring unions . . . to have full time organizers present during each labor campaign raises serious questions of labor policy, it is an issue for the Board, not the courts, to settle."). Moreover, it is irrelevant that the court agrees with the Board's decision: "We emphasize that we harbor no disagreement with the Board's policy choices. We ask only for a clear statement of what those choices and the reasons for them are." Sullivan Industries, 957 F.2d at 905 n. 12; cf. Securities & Exchange Comm'n. v. Chenery Corp., 318 U.S. 80, 94-95, 63 S.Ct. 454, 462-63, 87 L.Ed. 626 (1943) (holding that court can affirm administrative order only on grounds on which agency relied and noting that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained"). Accordingly, we remand this case to the Board for that clear explanation.

III. CONCLUSION

Because of the the NLRB's unique knowledge and experience in the field of labor relations, reviewing courts owe "special respect" to its choice of remedies for violations of the NLRA. See NLRB v. Gissel Packing, 395 U.S. 575, 612 n. 32, 89 S.Ct. 1918, 1939 n. 32, 23 L.Ed.2d 547 (1969). We will continue to give those choices the deference they are due. In order to do so in the context of affirmative bargaining orders, however, we must first be satisfied that in issuing such orders the Board has balanced competing labor policies, including the employees' right to representation of their own choice, and has clearly indicated the grounds upon which the order is based.

Appendix D

As we remarked recently, "five times in the past fourteen years, this court has remanded [bargaining] orders to the board with a request for explanation as to why, in the particular circumstances, the extra protection against decertification was necessary." Caterair, 22 F.3d at 1123. Caterair made it "an even half-dozen." Id. We reiterate that sentiment here, hopefully for the final time.

For the foregoing reasons, we deny the petition for review insofar as it challenges the Board's unfair labor practice finding and its decision not to order an election. However, we remand the remedial aspect of the case for the Board to explain its imposition of the bargaining order.

So ordered.

END OF DOCUMENT

APPENDIX E — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, DATED JUNE 5, 1997

EXXEL-ATMOS, INC.

AND

UNITED STEELWORKERS OF AMERICA, AFL — CIO

Case 22-CA-20475
Dated, Washington, D.C. June 5, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Upon a charge filed by the United Steelworkers of America, AFL — CIO, on February 21, 1995, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, issued a complaint and notice of hearing on April 27, 1995, against Exxel-Atmos, Inc., alleging that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended. The Respondent filed an answer to the complaint on May 9, 1995, admitting in part and denying in part the complaint allegations and asserting affirmative defenses.

On August 10, 1995, the General Counsel filed with the Board a Motion for Summary Judgment, with exhibits attached. On August 14, 1995, the Board issued an Order transferring proceeding to the Board and Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On September 6, 1995, the Respondent filed a reply

Appendix E

to the General Counsel's Motion for Summary Judgment and a cross-motion for summary judgment requesting that the complaint be dismissed.

Ruling on Motion for Summary Judgment

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent, a New Jersey corporation with an office and place of business in Somerset, New Jersey, has been engaged in the manufacture, sale, and shipment of non-gas aerosol delivery systems. During the 12-month period ending April 27, 1995, the Respondent, in the course and conduct of its business operations has sold and shipped from its Somerset, New Jersey facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of New Jersey. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that the Respondent violated Section 8(a)(1) and (5) by withdrawing recognition and refusing to bargain with the Union as the exclusive collective-bargaining representatives of the unit, consisting of production and maintenance workers, by soliciting and instigating the decertification of the Union and by giving a Christmas bonus to its unit employees without giving notice or the opportunity to bargain to the Union.

Appendix E

A. Facts

The Respondent, Exxel-Atmos, Inc., is a small manufacturer of nonaerosol dispensing systems in Somerset, New Jersey. The Respondent voluntarily recognized the Union as the collective-bargaining representative of its production and maintenance employees, without an election, on September 7, 1990.[1]

In May 1991, the Respondent unlawfully refused the Union's request for bargaining. In August 1991, the Respondent withdrew recognition from the Union and subsequently refused to bargain. The Board found that the Respondent violated Section 8(a)(1) and (5) of the Act by this conduct. The Court of Appeals for the District of Columbia issued its judgment dated July 15, 1994. Exxel-Atmos, Inc. v. NLRB, 28 F.3d 1243 (D.C.Cir.1994), enforcing in part and denying in part 309 NLRB 1024 (1992); petition for rehearing denied 37 F.3d 1538 (D.C.Cir.1994). That decision upheld the finding of the Board that the Respondent unlawfully refused to bargain with the Union in May 1991, and thereafter unlawfully withdrew recognition from the Union in September 1991. As to the remedy, the court enforced the Board's cease-and-desist order against the Respondent, but declined to enforce the Board's affirmative bargaining order. The court remanded the case to the Board for an explanation why such a bargaining order was the appropriate remedy. The Board subsequently reaffirmed its affirmative bargaining order.[2]

The undisputed facts in the instant case arose after the

1. Exxel-Atmos, Inc., 309 NLRB 1024 (1992).

2. Exxel Atmos, Inc., 323 NLRB No. 159 (June 5, 1997).

court's decision.[3] On about December 7, 1994, the Respondent's president, Ronald Lemke, held a meeting for all production and maintenance employees. At the meeting, Lemke read from a prepared speech that gave the unit employees instructions on how to decertify the Union. The text of the speech also informed the employees that the

> federal appeals court has now decided that the Company will be required to bargain with the Steelworkers union unless our employees clearly indicate that you [sic] do not want to have the union represent you. So, unless a sufficient number of you indicate that you do not want the union, if the union requests that we bargain with it, we will have to do so. [Emphasis marks handwritten on original prepared text.]

Lemke's invitation for questions from the employees drew no response. At the conclusion of the speech, Lemke left copies of the text of the speech, along with the address and telephone number of the Regional Office, on a table in the lunchroom for employees to take with them. Within days of the speech, form letters indicating dissatisfaction with the Union were circulated and signed by unit employees. In January 1995, employee Jay Soni presented Lemke with approximately 13 signed form letters. These letters later became the showing of interest for the decertification petition.

Further, the Respondent, without bargaining with the Union, decided to give all unit employees a first-time cash bonus of $100, referred to as a "Christmas Bonus." This bonus

3. The court of appeals issued its decision denying the Board's motion for rehearing en banc on November 4, 1994.

was paid sometime during the week of December 23, 1994. Lemke states in his affidavit that he and the Respondent's director of operations, Tom Sedita, made the decision to give the first-time bonus to show the Respondent's appreciation for the increased sales generated by the employees during 1994.

Based on the form letters from employees expressing dissatisfaction with the Union, the Respondent canceled all bargaining sessions scheduled for early 1995 and has since consistently refused to bargain with the Union.

On January 26, 1995, employee Soni, filed a decertification petition in Case 22-RD-1136. This petition is currently pending in the Regional Office for Region 22.

B. The Parties' Contentions

The General Counsel argues that despite the issuance of the court's judgment enforcing the Board's Order that the Respondent cease from refusing to bargain with the Union, the Respondent continues to refuse to bargain in violation of Section 8(a)(5) and (1). The General Counsel asserts that the Respondent met with the unit employees and provided them with unsolicited instruction on how to decertify the Union in violation of Section 8(a)(1), and, thereafter, decided to grant unilaterally all the unit employees a first-time cash bonus of $100, referred to by the Respondent as a "Christmas bonus" in violation of Section 8(a)(5) and (1).

In its answer to the complaint, the Respondent does not dispute any of the factual allegations. It, however, denies that the Union is the exclusive bargaining representative for its employees. It further denies that Lemke's December 7, 1994

speech to the employees served to solicit and/or instigate a decertification of the Union because the speech did not contain threats or a promise of benefits to the employees. The Respondent admits that it gave its employees a $100 cash Christmas bonus, but denies that the Company had a duty to provide notice to or the opportunity to bargain with the Union prior to giving the bonus to the unit employees. The Respondent admits that the Union requested it to bargain collectively on January 11, 1995, but denies that the Company unlawfully failed to bargain, asserting that it had a good-faith doubt as to the Union's majority status as of January 10, 1995, and that doubt was confirmed when the bargaining unit employees filed the decertification petition on January 26, 1995. Further, it acknowledges that the copy of the speech attached to the General Counsel's motion actually reflects the text of the speech given by Lemke to its employees on December 7, 1994. It asserts, as an affirmative defense, that the speech is protected by Section 8(c) of the Act; that it could not have instigated or solicited a decertification petition in view of its employees' past expressions of antiunion sentiment; that the granting of the Christmas bonus was a gift to its employees and was no more than an appropriate seasonal act by a responsible employer; and that the act was de mininis and cannot provide the basis for a violation of the Act.

C. Analysis

In Exxel-Atmos, Inc., 323 NLRB No. 159 (June 5, 1997), we affirmed our original findings that the proper remedy for the Respondent's earlier withdrawal of recognition and refusal to bargain with the Union is an affirmative bargaining order requiring the Respondent, upon request, to bargain with the Union for a "reasonable period of time." The Respondent,

however, has never acceded to any union demands for bargaining since its August 1991 unlawful withdrawal of recognition. In these circumstances, it is clear that a reasonable time for bargaining has not elapsed and that the Respondent's refusal to bargain violated Section 8(a)(5) and (1) of the Act.

In his unsolicited speech, the Respondent's president, Lemke, provided the unit employees with instructions on how to decertify the Union. In doing so, the Respondent unlawfully instigated the decertification petition among its employees in violation of Section 8(a)(1) of the Act.[4]

The Respondent admits that it gave its employees a $100 cash bonus on about December 23, 1994. This bonus was a clear deviation from past practice.

It is well-settled Board law that a bonus paid to employees, at Christmas or otherwise, is a condition of employment and the proper subject of collective bargaining.[5] In Niles-Bement-Pond Co., 97 NLRB 165 (1951), enfd. 199 F.2d 713 (2d Cir.1952), the Board held that although a year end bonus "may be paid at Christmas and therefore carry with it the Christmas spirit of gift giving, [such a bonus] amounts fundamentally to deferred compensation for services performed during the preceding year." Id. at 167.

The Respondent further concedes that the "Christmas

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4. Weisser Optical Co., 274 NLRB 961 (1985), and cases cited therein.

5. Cypress Lawn Cemetery Assn., 300 NLRB 609, 613 (1990); Singer Mfg. Co., 24 NLRB 444, 470 (1940), enfd. in relevant part 119 F.2d 131 (7th Cir.1941), cert. denied 313 U.S. 595 (1941).

bonus" was related to the increased sales performance of its employees in 1994. As we have stated, "the policy of the Act to encourage collective bargaining in the interest of industrial peace is best served by requiring an employer to negotiate on the subject matter of such a bonus." Id. at 167.

We conclude, therefore, that the $100 cash "Christmas bonus" constitutes wages, and as such, is a proper subject for collective bargaining. The Respondent's unilateral action on granting the bonus violated Section 8(a)(5) and (1) of the Act.

Finally, even had we not determined in the underlying Exxel-Atmos case that the Respondent was precluded from withdrawing recognition as a result of the affirmative bargaining order, we would find that the Respondent could not lawfully withdraw recognition based on the January 1995 decertification petition. Thus, that petition is tainted because it was unlawfully instigated by the Respondent in violation of Section 8(a)(1) and was circulated in the context of the Respondent's unilateral grant of the $100 "Christmas bonus" which violated Section 8(a)(5) and (1).

CONCLUSIONS OF LAW

1. By withdrawing recognition and refusing on and after January 11, 1995, to bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By making a speech on about December 7, 1994, and providing unsolicited information on how to decertify the Union, the Respondent has violated Section 8(a)(1) of the Act.

Appendix E

3. By conferring on its employees a $100 cash "Christmas bonus," the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of employment for its employees.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist therefrom, and take certain affirmative action necessary to effectuate the policies of the Act.

Appendix E

ORDER

The National Labor Relations Board orders that the Respondent, Exxel-Atmos, Inc., Somerset, New Jersey, it officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Steelworkers of America, AFL—CIO, as the exclusive bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees, quality control employees, laboratory technicians, and senior laboratory technicians employed by the Respondent at its Somerset, New Jersey facility, but excluding all office clerical employees, professional employees, sales employees, guards and supervisors as defined in the Act.

(b) Soliciting and/or instigating a decertification petition among its employees.

(c) Refusing to bargain in good faith by making unilateral changes without providing notice to the Union and an opportunity to bargain.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with the Union as the exclusive representative of the employees in the unit, and embody any agreement reached in a written contract.

(b) On request, bargain with the Union regarding the granting of a "Christmas bonus" to unit employees.

(c) Within 14 days after service by the Region, post at its facility in Somerset, New Jersey, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 7, 1994.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible

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6. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

William B. Gould IV
Chairman

Sarah M. Fox
Member

John E. Higgins, Jr.
Member

Appendix E

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with United Steelworkers of America, AFL—CIO as the exclusive representative of the employees in the following appropriate unit:

All full-time and regular part-time production and

maintenance employees, quality control employees, laboratory technicians, and senior laboratory technicians employed by us at our Somerset, New Jersey facility, but excluding all office clerical employees, professional employees, sales employees, guards and supervisors as defined in the Act.

WE WILL NOT solicit and/or instigate a decertification petition among our employees.

WE WILL NOT refuse to bargain in good faith by making unilateral changes without providing notice to the Union and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain in good faith with the Union as the exclusive representative of the employees in the unit, and embody any agreement reached in a written contract.

WE WILL, on request, bargain with the Union regarding the granting of a "Christmas bonus" to unit employees.

EXXEL-ATMOS, INC.
NATIONAL LABOR RELATIONS
BOARD (N.L.R.B.)

APPENDIX F — SUPPLEMENTAL DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED JUNE 5, 1997

EXXEL-ATMOS, INC.

AND

UNITED STEELWORKERS OF AMERICA, AFL — CIO
Case 22-CA-17889
Dated, Washington, D.C. June 5, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On December 16, 1992, the National Labor Relations Board issued its Decision and Order[1] in this proceeding. The Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by unlawfully withdrawing recognition from the Union and refusing to bargain with it. In addition to an order requiring the Respondent to cease and desist from this conduct, the Board imposed an affirmative bargaining order requiring the Respondent, upon the Union's request, to recognize and bargain with it.

On July 15, 1994, the United States Court of Appeals for the District of Columbia Circuit affirmed the Board's unfair labor practice findings and conclusions and enforced the remedial order with the exception of the affirmative provision requiring the Respondent to recognize and bargain with the Union.[2] The court remanded the case to the Board for an

1. 309 NLRB 1024.

2. 28 F.3d 1243 (D.C.Cir.1994).

explanation justifying, beyond the cease-and-desist order, the imposition of an affirmative bargaining order. On November 4, 1994, the court denied the Board's petition for rehearing en banc.[3]

On February 1, 1995, the Board advised the parties that it had accepted the remand and invited statements of position. The Respondent and the General Counsel filed statements of position.

The National Labor Relations Board has considered its original decision and the record in light of the court's remand and the parties' statements of position.[4] We have decided to affirm the Board's previous Decision and Order.

The Board's statement of policy concerning the imposition of affirmative bargaining orders is set forth in Caterair International.[5] In Caterair we reaffirmed our longstanding policy of issuing an affirmative bargaining order as the standard appropriate remedy for the restoration of the status quo after an employer's unlawful withdrawal of recognition from an

3. 37 F.3d 1538 (D.C.Cir.1994).

4. We reject the Respondent's contention that the Board should not reconsider imposing an affirmative bargaining order to remedy its 1991 unfair labor practices as the issue is moot because the Board proposed that the court enter a judgment containing a cease-and-desist order. The court's enforcement of the cease-and-desist portion of the order does not render moot the question of whether an affirmative bargaining order is appropriate. The court specifically remanded, for explanation, the issue of whether an affirmative bargaining order is a necessary remedy.

5. 322 NLRB No. 11 (Aug. 27, 1996).

incumbent union and subsequent refusal to bargain. As we stated in Caterair:

> [E]xperience confirms our view that a bargaining order is routinely appropriate even when the incumbent union has lost its majority support after the employer's unfair labor practices, and even though the order will, for a reasonable period, preclude a decertification election to test the union's majority status.
>
> . . . .
>
> . . . An affirmative bargaining order certainly serves the interests of the incumbent union by restoring "the bargaining opportunity which it should have had in the absence of unlawful conduct."
>
> Id., slip op. at 2, 4, citing Williams Enterprises, 312 NLRB 937, 940 (1993), enfd. 50 F.3d 1280 (4th Cir.1995).

We also explained in Caterair, that we have considered and balanced the critical statutory policies and rights relevant to the affirmative bargaining remedy and find no need to engage in a case-by-case factual analysis to justify its future imposition.

Therefore, for the reasons set forth in Caterair, we affirm our finding that an affirmative bargaining order is the appropriate remedy for the Respondent's unlawful withdrawal of recognition from the Union and its refusal to bargain.

The Respondent asserts that if the Board finds that an affirmative bargaining order is warranted, then the Board should

expressly clarify that the decertification bar that accompanies an affirmative bargaining order applies for only 4 months from the date of the order.[6] The Respondent notes that the court stated in its remand Order that "the decertification bar (provided its duration is substantially tailored to restore to the union that part of the one-year period that was denied it by the company's unfair labor practice) simply affords the union on the same protection it rightfully enjoyed during its first year."[7] The court made this observation in connection with its discussion of some policy considerations which are relevant to the issuance of an affirmative bargaining order. The court, however, specifically stated that it was up to the Board, in the first instance, to make labor policy.

The Board's view of this matter was recently set forth at length in Lee Lumber & Building Material Corp., 322 NLRB No. 14 (Sept. 6, 1996). In Lee Lumber, the Board noted (slip op. at 3) that an employer's unlawful refusal to recognize and bargain with an incumbent Union is likely to have "a significant, continuing detrimental impact on employees, causing them to become disaffected from the union." Requiring the employer that has engaged in this unlawful conduct to bargain for a "reasonable time" is aimed at to restoring the union to the position it would have been in absent the unlawful withdrawal of recognition.[8] A "reasonable time" does not depend on either

6. This figure is based on the Respondent's view that the court required only that it recognize and bargain with the Union for 1 year. Since 8 months had elapsed between the Respondent's September 1990 voluntary recognition of the Union and its May 1991 refusal to bargain, the Respondent claims that the Board can only require it to bargain with the Union for the 4 months remaining in this 1-year period.

7. 28 F.3d 1243 at 1248.

8. In Lee Lumber, we held that in the absence of special (Cont'd)

the "passage of time or on the number of meetings between the parties, but instead on what transpired and what was accomplished during the meetings." Id. slip op. at 5. In assessing whether there has been bargaining for a reasonable time the Board considers the degree of progress made in negotiations, whether or not the parties are at impasse, and whether the parties are negotiating for an initial contract.[9] Obviously, the determination of whether a reasonable time has elapsed cannot be made prospectively, but can only be made after an examination of the bargaining history.

Accordingly, we adhere to the Board's earlier determination that an affirmative bargaining order requiring that the parties bargain is the appropriate remedy. And, consistent with our rationale in Lee Lumber, we shall require the Respondent, upon the Union's request, to bargain with it for a "reasonable period."

(Cont'd)

circumstances — not here applicable — the presumption of unlawful taint caused by an employer's unlawful withdrawal of recognition and refusal to bargain "can be rebutted only by an employer's showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining. Id., slip op. at 4.

9. Id.

Appendix F

ORDER

The National Labor Relations reaffirms its original Order, reported at 309 NLRB 1024 (1992), and orders that the Respondent, Exxel-Atmos, Inc., Somerset, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

William B. Gould IV
Chairman

Sarah M. Fox
Member

John E. Higgins, Jr.
Member

APPENDIX G — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, DATED DECEMBER 16, 1992

EXXEL-ATMOS, INC.

AND

UNITED STEELWORKERS OF AMERICA, AFL—CIO
Case 22-CA-17889
Dated, Washington, D.C. December 16, 1992

DECISION AND ORDER

In this proceeding the Board must determine whether the Respondent violated Section 8(a)(1) and (5) of the Act by unlawfully withdrawing recognition from the Union.

On July 23, 1992, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions to the judge's decision and a supporting brief. The General Counsel filed limited cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

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1. The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are

(Cont'd)

Appendix G

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Exxel-Atmos, Inc., Somerset, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b) and reletter the remaining paragraph.

(Cont'd)

incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir.1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's finding (at one point designated an "alternative finding" by the judge) that the Respondent violated Sec. 8(a)(1) and (5) of the Act on May 7, 1991, by refusing to meet with the Union's full bargaining committee to engage in any "formal" negotiations. We further adopt his finding that it withdrew recognition by that refusal, together with its refusal to bargain, unless and until the employees voted in an election. We therefore find it unnecessary to pass on the judge's alternative findings based on actions subsequent to May 7. We have modified the Order to include a provision requiring the Respondent to cease and desist from refusing to meet with representatives of the employees designated by the Union.

The judge inadvertently refers to June 10 and 12, 1990, and July 1990. The correct dates are September 10 and 12, 1990, and July 1991. The judge also misspells the surname "Appelgate" throughout his decision. The correct spelling is "Applegate." Finally, the judge improperly cites the case number for the Respondent's RM petition. The correct case number is 22-RM-679.

Appendix G

"(c). Refusing to meet with the representatives of the employees as designated by the Union."

2. Substitute the attached notice for that of the administrative law judge.

James M. Stephens
Chairman

Dennis M. Devaney
Member

John N. Raudabaugh
Member

Appendix G

APPENDIX

Notice To Employees

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice:

WE WILL NOT withdraw recognition from or refuse to meet and bargain collectively with United Steel Workers of America, AFL — CIO (the Union), as the exclusive bargaining representative of our employees in the appropriate bargaining unit set forth below.

WE WILL NOT refuse to meet with the representatives of the employees designated by the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL on request, recognize, meet, and bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of our employees in the unit described below, regarding wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract. The appropriate unit is:

Appendix G

All full-time and regular part-time production and maintenance employees, quality control employees, laboratory technicians, and senior laboratory technicians employed by us at our Somerset, New Jersey facility, but excluding all office clerical employees, professional employees, sales employees, guards and supervisors as defined in the Act.

EXXEL-ATMOS, INC.

DECISION

Statement of the Case

Steven B. Fish, Administrative Law Judge:

Pursuant to charges and amended charges filed by United Steelworkers of America, AFL—CIO, herein called Charging Party or the Union, on August 8, 1991, and September 11, 1991[1] respectively, the Director for Region 22 issued a Complaint and Notice of Hearing on November 27, alleging that Exxel/ Atmos, Inc., herein called Respondent violated Section 8(a)(1) and (5) of the Act, by in substance withdrawing recognition from and refusing to bargain with the Union.

The trial with respect to the issues raised by said complaint was held before me in Newark, New Jersey on March 16 and March 27, 1991.

Briefs have been filed by General Counsel and Respondent. The certification of service filed with General Counsel's brief dated May 29, 1991 indicates that service was made by certified

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1. All dates hereinafter are in 1991 unless otherwise indicated.

mail upon Respondent's attorney, and by regular mail upon the parties. Such certification does not indicate how service was made upon the Administrative Law Judge. However, a cover letter dated May 29, 1991 to the undersigned states "enclosed please find an original and 3 copies of the General Counsel's brief in the above-captioned matter."

On June 18, Respondent submitted a reply brief dated June 16, 1991, although it neither asked for nor received permission to file such a document. In the reply brief, Respondent contends that General Counsel's brief was untimely and should be rejected. Respondent argues that since General Counsel did not in its papers indicate that service of the brief to the Administrative Law Judge was hand delivered or made by fax, the assumption is that the breif was not so served, and was therefore untimely, since the due date for receipt was May 29, 1991. Respondent further contends that therefore General Counsel had in his possession a copy of Respondent's brief, and had the opportunity to fashion his arguments in response to Respondent's brief, an advantage denied to Respondent.

Respondent in its reply brief then responded to General Counsel's brief asserting that General Counsel made various misstatements of fact and law.

By letter dated June 25, 1991, General Counsel urges that since Respondent neither asked for nor received permission to file a reply brief, that said brief be rejected and not considered. Moreover, with respect to the filing of its own brief, General Counsel asserts that a copy was hand delivered to the Division of Judges on May 29, 1991 in a timely fashion, and the failure to so indicate on the certification of service was an inadvertent error.

Appendix G

Although General Counsel did not file a supplementary certification or affidavit of service indicating hand delivery of the brief on May 29, which would have been appropriate, I shall accept his assertion in his letter that timely service was effectuated in that manner. Therefore, I shall deny Respondent's request to reject General Counsel's brief.

However, in view of the uncertainty created by General Counsel's failure to properly establish timely service, I deem it appropriate to receive and consider Respondent's reply brief notwithstanding its failure to request permission to file such a document. Accordingly, I shall deny General Counsel's request to reject Respondent's reply brief.

Based upon my review of the entire record,[2] I make the following

Findings of Fact

I. Jurisdiction and Labor Organization

Respondent is a corporation with an office and place of business in Somerset, New Jersey, herein called Respondent's faciliy, where it has been engaged in the manufacture, sale and shipment of non-gas aerosol delivery systems. During the past year, Respondent sold and shipped from its facility, products, goods and materials valued in excess of $50,000 directly to points outside the state of New Jersey.

2. While every apparent or non-apparent conflict in the evidence may not have been specifically resolved herein, my findings are based upon my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony. Accordingly, any testimony which is inconsistent with or contrary to my findings is hereby discredited.

Appendix G

It is admitted and I so find that Respondent is and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted and I find the Union is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. Facts

In the summer of 1990, the Union began an organizational campaign amongst Respondent's employees. After obtaining cards from a majority of employees, the Union filed a petition in Case No. 22-RC-10360. On August 13, 1990, the parties entered into a Stipulation providing for an election, as well as a stipulation with respect to eligibility to vote consistent with Norris Thermador 119 NLRB 1301 (1958). The list contained nineteen names.

By September 7, 1990, Respondent having concluded that a majority of employees in the agreed upon bargaining unit desired to be represented by the Union, faxed to the Union an agreement signed by its president Peter Gould, to recognize it as the exclusive representative of Respondent's employees in a unit of production and maintenance employees, quality control employees, laboratory technicians and senior technicians. On the same day, Daniel Appelgate, the Union's staff representative responded also by fax, accepting recognition, and requesting that he be telephoned in order to arrange dates for negotiation.

On the very same day, September 7, 1990, Respondent laid off five bargaining unit employees, including many of the Union's key supporters. Appelgate upon being informed about

the layoffs, immediately telephoned Respondent's attorney Francis Connell III. Appelgate complained to Connell about the layoff of the employees and asked that they be put back to work. Connell replied that the decision to lay off was based solely on economic factors and that Respondent was losing money. Appelgate also asked Connell to set up a meeting to bargain and negotiate a contract. Connell responded that he would check with Gould about available dates. Appelgate suggested any day during the next week, commencing September 10.

Upon checking with his client, Connell discovered that the only date available for a meeting was Wednesday, September 12. Accordingly, Connell called the Union's office and left a message on a tape machine that Respondent would be willing to meet with Appelgate and the Union on September 12 at 3:30 P.M. On Monday, September 10, Appelgate called Connell and they confirmed a meeting for September 12 at 3:00 PM at Respondent's premises. Appelgate advised Connell that he would be bringing with him his Assistant Director Manny Mihrail. Later that morning, Mihrail called Connell and asked if the meeting could be rescheduled for Thursday or Friday, September 13 or 14. Connell replied that he would be out of town on those days. Mihrail told Connell that he would change his appointment and be available for the September 12 meeting.

However, at 12:15 P.M., that day, a message was taken at Connell's office from Appelgate cancelling the meeting. The message read, "can't meet with you on Wednesday. Will reschedule". On that same day, September 10, 1990, Michael Donnelly, one of the employees laid off by Respondent, filed charges with the Region in Case No. 22-CA-17244, alleging Respondent had violated Section 8(a)(1) and (3) of the Act by

laying off Donnelly and four other employees because of their membership and activities on behalf of the Union. On September 13, 1990, the Union filed a similar charge in Case No. 22-CA-17253. Later that day, Appelgate called Connell and informed him that the Union had filed charges with respect to the layoff, and that he had asked the Region to consider the charges as blocking charges vis a vis the election scheduled for October 5, 1990. Connell subsequently telephoned the Board Agent, Eric Shechter to confirm Appelgate's information concerning the election. According to Connell, Shechter informed him that as far as he (Shechter) knew, the Union, had not asked the Board to block the election, and as far as he knew, the election would go forward after the unfair labor practices were disposed of. At some subsequent point, undisclosed by the record, the election scheduled for October 5, 1990 was postponed.

On October 9, 1990, Connell sent a 14 page position paper to the Region, in connection with the pending unfair labor practice charges. In that document, Connell asserted that after the bargaining session was postponed, "the NLRB subsequently notified the Company that the Union had decided to refuse the Company's offer of voluntary recognition." Connell admitted in his testimony that he could not recall the Board Agent specifically stating that the Union was "refusing the Company's offer of recognition", but claims that he would not have written it in the position paper, had it not been told to him. Appelgate denies that he ever told the Board Agent that the Union was refusing the Respondent's offer of recognition. There is no evidence that the Union ever received or saw a copy of Respondent's position paper, submitted to the Board by Connell.

Between September 13, 1990 and May 7, 1991, neither

Appendix G

Appelgate nor anyone else from the Union made any efforts to contact Respondent concerning negotiations or for any other reason.

The above findings with respect to the events up to May 7, 1991 are based on a synthesis of the credible testimony of the witnesses, plus my evaluation of documentary evidence submitted by the parties. Thus, I credit Connell, contrary to Appelgate's testimony and conclude that a bargaining session had been scheduled for September 12, and was subsequently canceled by the Union.

In that connection, I rely principally on Connell's calendar which included the meeting on that date with a line through it, Respondent's phone memo dated September 10, indicating a message from Appelgate to Gould, reading, "cancel meeting on Wednesday", plus Connell's memorandum to his file dated September 11, 1990, which described fully the circumstances consistent with his testimony. Although Appelgate also submitted his calendar which did not have any entries for September 12, I find Respondent's evidence on this issue more persuasive, and conclude that Appelgate probably neglected to include the meeting in his calendar for June 12 since it was canceled later on in the very same day, June 10, 1990 that the meeting had been agreed to.

Additionally, I have not credited Appelgate's testimony that he tried to call Gould once a month from October of 1990 to May 1991 in order to request negotiations and on each occasion left a message to call back. Rather, I credit the testimony of Respondent's clerical employees supported by their examination of Respondent's phone records, that no such messages were left, as well as the fact that all calls for Gould

would have been directed to his successor Robert Shiels, who replaced Gould as president of Respondent in November of 1990. I would also note the Region's Order Consolidating Cases and Dismissing Petitions which issued on December 5, 1991. That document asserts that the Union requested Respondent to bargain after (emphasis supplied) disposition of pending unfair labor practice charges. Finally, I rely on Appelgate's own testimony as to why he did not follow up on his alleged efforts to call Respondent only once a month. He explained his failure to make a more substantial effort to contact Respondent, by pointing out that the unfair labor practice charges were still pending and he was hoping that the employees would be returned to work as a result of such charges. I conclude therefore that Appelgate and the Union decided not to make any efforts to negotiate with Respondent, until the disposition of the unfair labor practice charges. I further conclude that when Appelgate called Respondent on May 7, 1991, that he was aware at that time that the charges were going to be dismissed unless withdrawn, and that is the reason that he made the call at that time to attempt to commence negotiations with Respondent.[3]

On May 7, Shiels returned Appelgate's telephone call. Appelgate requested that Respondent meet with him and his committee of employees to negotiate a contract. Shiels replied that would agree to meet with Appelgate one on one to discuss what the issues are and for him (Shiels) to find out "where we were". However, Shiels also told Appelgate that there would be no formal negotiations unless the employees voted for representation by the Union in an election. Shiels added that

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3. Although the charges wered withdrawn on May 31, I find it likely that the Union had been notified of the Region's decision to dismiss the charges absent withdrawal, and were still deciding whether or not to withdraw the charges when Appelgate made his call.

he wanted the employees to have an opportunity to pick their bargaining representativew or at lease vote for their wishes. Shiels emphasized that he "felt firmly" about that. Appelgate responded that an election was not necessary, since the Union had the cards and had a written agreement by Respondent for recognition.[4] Appelgate would not agree to Shiels' request for a one on one meeting, insisting that the parties commence formal negotiations immediately with the full bargaining committee present.

On June 17, Appelgate and Shiels again spoke by telephone, and the conversation was virtually identical as the May 7 discussion between them.

I have credited Shiels' version of the conversations between him and Appelgate. While Shiels recalled that the discussions took place in early 1991, I find his testimony concerning dates not to be accurate, in view of the phone logs, and the other evidence as detailed above, which indicates that the Union did not call until May when it became aware that the charges were to be dismissed. I also credit Shiels that there were two conversations between him and Appelgate, which is also supported by Respondent's phone memo dated June 17. This memo reflects that on June 17, Shiels left a message with Jesus Osuna, Respondent's Vice President that he (Shiels) wants to see Osuna about a phone conversation between Shiels and Appelgate of the Union. I conclude that this June 17 memo refers to the second conversation between Shiels and Appelgate, wherein Shiels recalled that the substance of the discussion was identical to his May 7 conversation with Appelgate.

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4. Shiels admitted that he was familiar with the September 7, 1990 agreement by Respondent to recognize the Union, signed by Gould, Shiels' predecessor as president.

Appendix G

By letter dated July 16, 1991, to Shiels, Appelgate requested that Respondent call him at their earliest convenience to arrange mutually acceptable dates for contract negotiations. Upon Respondent's receipt of the July 16 letter on July 17, Shiels instructed Osuna to call Appelgate the first thing next morning.[5] On July 18, at 8:49 AM. Osuna placed a call to the Union at the telephone number on the Union's July 16 letter, 908-287-4011. Appelgate was not there, so Osuna left a message with his full name, phone number, and that he was from Exxel, and asked Appelgate to return the call.

Appelgate asserts that the message that he received read only "Jesus", without any last name, phone number or other identification, so he did not know that his call had been returned by Respondent.

William O'Donnell who had been a bargaining unit employee, until he was promoted to supervisor in April of 1991, heard talk in July of 1991 that Respondent would be commencing negotiations with the Union. O'Donnell had circulated a petition on September 11, 1990, when he was a bargaining unit employee. The petition which he prepared without any involvement from or knowledge of Respondent's supervisors, was entitled "Petition to keep Union out". It went on to read, "We the EMPLOYEES of EXXEL container, DO NOT want to be represented by the United Steel Workers Union nor any other Union. We do our own talking". O'Donnell's signature appeared first, followed by the signature of seven other bargaining unit employees, Vinny Dao, Nick Rybski, Robert Barney, Ghanshyam Patel, Thakorbai Patel, Bhanabhai

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5. The record does not reflect what Shiels instructed Osuna to say to Appelgate.

Patel,[6] and Thuy T- Phan. A date of September 11, 1990 appeared next to each of the names. Of the eight names on the petition, seven of them, (all but Thy Phan) testified herein and confirmed their signatures on the petition, and except for employee Rybski, that they had signed the petition in September of 1990.[7] O'Donnell testified that he circulated the petition when he found out Respondent intended to recognize the Union. After obtaining these signatures, O'Donnell called the NLRB and was allegedly told that "I did not follow procedure, that this has no validation, basically it wasn't up to me to do this." O'Donnell then placed the petition in the glove box in his truck, where it remained until July of 1991.

On or about July 24, 1991, O'Donnell after hearing about the possibility of Respondent negotiating with the Union, decided to inform Respondent about the petition. O'Donnell informed Osuna that he (O'Donnell) had a petition indicating that the employees didn't want a union, which was signed in September of 1990, and asked if Osuna wanted to see it. Osuna replied that he did not know if it would do any good, but that he would like to see the petition. O'Donnell then gave the petition to Osuna. Osuna asserts that the receipt of petition created a doubt in his mind whether the Union had lost their majority status. At that time, Respondent employed fourteen employees, and the list contained eight signatures, all of whom were still employed by Respondent.[8]

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6. The three Patels are not related.

7. As noted above, in September of 1990, the bargaining unit consisted of nineteen employees.

8. As noted, O'Donnell whose name also appeared thereon, was a supervisor in July of 1991.

Appendix G

After consulting with its attorney, Respondent prepared an inter office memo dated July 25 and posted it in the plant. The memo reads as follows:

EXXEL/ATMOS, INC.

INTER-OFFICE MEMO

TO: All Shop Personnel

FM: Bob Shiels

DATE; JULY 25, 1991

SUBJECT: UNITED STEELWORKERS UNION

We want to let you know of recent events concerning the United Steelworkers Union.

We have received a letter from the union demanding that we bargain and negotiate a contract which would establish your wages, hours and working conditions.

However, we have also learned that a number of you signed a petition in September, stating that you do not want union representation. We're trying to decide what to do.

We really believed, when we recognized the Union, that a majority of you wanted the union. However, in light of this petition, we are not sure what to do. We plant to decide soon to make the right decision for all concerned.

If you have any questions, please feel free to ask Jesus Osuna, Steve Leggin, Gene Paino, or your supervisors.

Appendix G

Subsequent to the posting of this memo, on July 25, employee Robert Barney told Respondent's plant supervisor Steve Leggin "I don't want no Union". Leggin wrote a memo to this effect dated July 25 at 2:35 P.M., after reporting the conversation to Osuna.[9]

Eugene Paino, Respondent's Vice President of technical services, testified that on or about August 1, employee Nick Rybski came to him and expressed anti- union sentiments. According to Paino, Rybski mentioned that he "wasn't too fond of unionism", that he was "anti-union"; and that he "didn't want to see a Union in Exxel". Paino further testified that he immediately reported the conversation to Osuna, who wrote a memo dated August 1, stating that Paino had told Osuna at 1:30 P.M. on that date, that "Niels Rybski did not want a union". Rybski, while admitting that his signature appeared on the 1990 petition, did not recall having signed it, nor did he recall any conversations with Paino or any other Respondent official in 1991 where he stated that he did not want the Union. Rybski did recall complaining to Osuna in 1990 about having to go into the Union because he "Rybski" was a salaried employee. Additionally Rybski's affidavit unequivocally denies having spoken to anyone else about the Union subsequently, and denies further that he had spoken to Paino, Osuna or any other representative of Respondent concerning his preferences regarding the Steelworkers or any other Union.

Additionally, Tomasco testified that on July 26, employee Ghanshyam Patel approached him and stated that he (Ghanshyam) didn't want the Union anymore. Tomasco asserts that he reported this to Leggin, and overheard Ghanshyam tell Leggin that "he" didn't want the Union, and that "we" didn't

9. Leggin's testimony in this regard was corroborated by Barnes.

want the Union, without any further identification of "we". Leggin, however; recalls that Tomasco informed him that Ghanshyam had said to Tomasco that he (Ghanshyam) and Sudhirnbai, Bhanubhai, and Thakorbhai Patel did not want a Union.[10] Leggin also testified that when he spoke to Ghanshyam in Tomasco's presence, Ghanshyam confirmed that he plus the other three Patel's did not want the Union. Ghanshyam on direct examination confirmed that he had spoke to Tomasco and Leggin in July of 1991 and told them that "we don't want a Union". He added that what was meant by "we" was the four Patel's, but he did not testify that he specifically told either supervisor what he meant by "we", nor on what basis he asserted that the four Patels did not want a Union. On cross-examination Ghanshyam changed his recollection, and asserted that his conversation with Tomasco and Leggin about the Union was before Tomasco became a supervisor, and was to the best of Ghanshyam's recollection in February and March of 1991.

Leggin and Tomasco also testified that during their conversation with Ghanshyam, Ghanshyam suggested that they speak to the other Patels about the matter. Thus, they assert that Gunshyam went with them in the shop to Bhanubha Patel and told Leggin to ask Bhanubhai. Leggin and Tomasco allege that Leggin replied that the employees were supposed to have something to tell him. At that point, Leggin claims that Ghanshyam spoke to Bhanubhai in an Indian dialect, that Leggin did not understand. Then according to Leggin and Tomasco, Bhanubhai told Leggin and Tomasco that he (Bhanubhai), Sudhirnbai, and Thakorbhai did not want the Union.[11]

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10. As noted, none of the Patels are related to one another.

11. As noted however, Ghanshyam on cross-examination indicated that these events took place in February or March of 1991.

Appendix G

Bhanuhai and Thakorbai both testified that they signed the petitions in 1990, because they did not want to "join the Union". However, they both deny having any conversations with Leggin or any supervisor about the Union.

Sudhirnbai Patel, who did not sign the petition, testified that in July of 1991, Leggin approached him in the cafeteria and asked if he wanted the Union. Sudhirnbai testified that he replied that he did not want the Union. Leggin gave no testimony about a conversation with Sudhirnbai, nor was any memo introdcued of that conversation.

Osuna did write a memo dated July 26, 1991, which asserts that Tomasco was told by Ghanshyam Patel that, quote, "me, Bhanna, Sudi and Thako don't want a Union." The memo further asserts that "this was brought to my attention on July 26th, Friday at 3:30 P.M.

On July 31, Appelgate signed and mailed the charge in the instant case to the Board, which was filed on August 2, 1991, alleging that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain collectively with representatives of its employees.[12]

Meanwhile, after receiving the reports from supervisors concerning employee sentiments, plus a copy of the July 1990 petition, Osuna testified that Respondent in early August based on those factors doubted the Union's majority status. Therefore, after consultation with its attorney, Respondent filed an RM Petition in Case No. 22-RM-679 on August 7, with a letter from Shiels dated August 5, setting forth the facts supporting the

12. A copy of this charge was not received by Respondent until August 8.

petition. The following factors were relied upon by Respondent in its letter to support its alleged doubt of the Union's majority status.

Exxel no longer believes that the Steelworkers' Union represents a majority of the collective bargaining unit for the following reasons:

1. Exxel's management has recently learned that, on September 11, 1990 (four days after the Company voluntarily recognized the Steelworkers, eight members of the bargaining unit signed a petition stating that they did not want to be represented by the Steelworkers or by any other union. A copy of the petition is enclosed. This petition was not presented to management until July of 1991.

2. Within the past few days, six members of the bargaining unit have advised management, either directly or indirectly, that they do not wish to be represented by the Steelworkers or by any other union.

3. Neither the September 11, 1990 petition, nor the recent anti-union comments were solicited by management in any way.

4. The bargaining unit at this time, and for the past several months, consists of only thirteen employees. Six of these thirteen[13] employees have recently expressed their desire not to be represented by the union. At least one other employee signed the September 11, 1990 petition.

5. The Company was advised by the Board in September

13. Respondent concedes that this number was incorrect, and that the unit consisted of fourteen employees.

or October of 1990 that the union had refused the Company's offer of voluntary recognition, and the union in fact made no effort to bargain with the Company at any time between September 7, 1990 and July 17, 1991.

Based on the foregoing factors, we seriously doubt that the Steelworkers Union currently represents a majority of the employees in the bargaining unit. We believe that the only way to determine the true wishes of the majority of our employees is to do so through a Board-supervised election.

On or about August 6, Appelgate telephone Osuna. After a discussion about why Appelgate had not returned Osuna's July 18 call, Appelgate informed Osuna that he had filed unfair labor practice charges against Respondent, and Osuna told Appelgate that Respondent was filing a petition with the Board for an election.

The instant complaint was issued on November 27. On December 5, the Region issued an Order Consolidating Case No. 22-RC-10360 and 22-RM-629, and dismissing both petitions because of the issuance of the complaint, but adding that the petitions are subject to reinstatement after disposition of the unfair labor practice case.

III. ANALYSIS

The applicable legal principles necessary to decide the instant matter are succinctly summarized by the Board in Royal Coach Lines 282 NLRB 1037, 1987 enfd. denied on other grounds 838 F2d 47 (2nd Cir.1988).

The Board has consistently held that where, as here, an

employer has validly extended voluntary recognition to a union, the union is entitled to an irrebuttable presumption of majority status until a reasonable time for bargaining has elapsed. Rockwell International Corp., 220 NLRB 1262, 1263 (1975); Keller Plastics Eastern, 157 NLRB 583, 587 (1966). A reasonable time is not measured by the number of days or months spent in bargaining, but by what transpired and what was accomplished in the bargaining sessions. Brennan's Cadillac, 232 NLRB 255 (1977). Once a reasonable time for bargaining has elapsed, the union enjoys a rebuttable presumption of majority status. This presumption can be rebutted by the employer's showing that at the time of its refusal to bargain, the union did not have majority status in fact, or that the employer had a good-faith doubt of the union's majority status based on objective factors. See generally Bartenders Assn. of Pocatello, 213 NLRB 651 (1974); Cain's Generator Co. 237 NLRB 1198 (1978). Id. at 1038.

Here, there is no dispute that Respondent voluntarily recognized the Union as the collective bargaining representative of its employees on September 7, 1990. The next question to be determined is whether or not a reasonable time for bargaining had elapsed when Respondent withdrew recognition from the Union. However, before resolving that issue, it must be determined when Respondent actually withdrew recognition from the Union

In that regard, General Counsel contends that Respondent withdrew recognition from the Union by virtue of Shiels' response to Appelgate's request for bargaining on May 7, 1991. Respondent disagrees, contending that this conversation did not amount to a withdrawal of recognition, and that recognition was not not withdrawn until August of 1991. I am in agreement

with General Counsel's analysis of Shiels' remark, and find that while Shiels did not use the words withdrawal of recognition in his response, no other reasonable interpretation of his words is warranted. Thus, while he did agree to meet with Appelgate on a "one on one" basis, to discuss what the issues were, Shiels made abolutely clear to Appelgate that he did not wish to meet with the Union's full bargaining committee, and that he would not engage in "formal" negotiations with the Union, unless and until the employees voted in an election. Shiels told Appelgate that he wanted the employees to have an opporunity to pick their bargaining agent, and added that he "felt firmly" about that. Thus, I conclude that the totality of Shiels' remarks amounted effectively to a withdrawal of recognition. Cargill, Inc., d/b/a Paramount Poultry 294 NLRB 867 (1989); Lexington Cartage Company 259 NLRB 55, 56-58 (1981) (Employer attended four negotiation sessions with the Union, and at each one made no counterproposals, and stated that it was the position of the Employer that the Union did not represent a majority of employees, and therefore it was not obligated to bargain with the Union. Held that the Employer withdrew recognition at first meeting that it made the above statements.)

Respondent argues that Shiels never actually foreclosed subsequent bargaining sessions with the Union, and that his request for an initial get acquainted meeting with Appelgate was not unreasonable, nor did it constitute a withdrawal of recognition. I do not agree. In my view, if Shiels' intent as contended by Respondent was to engage in future negotiations with the Union and its full committee after his "get acquainted" meeting with Appelgate, it was incumbent upon him to make that position clear. Not only did Shiels not do so, but his other remarks that he would insist upon an election among

Respondent's employees, notwithstanding its prior recognition of the Union, clearly demonstrates Respondent's position. I conclude that Shiels was obviously unhappy with the decision of his predecessor as chief executive of Respondent, to recognize the Union, and that he did not consider himself bound by that action.[14] Thus Shiels was agreeing to meet with Appelgate as a courtesy to see what the issues were, at the same time he was clearly informing the Union that he did not consider Gould's agreement to recognize the Union binding upon him or Respondent, and that he would require the Union to demonstrate its majority status by winning an election, before commencing actual bargaining. This position amounts to a withdrawal of recognition and I so find.

Having so found, the question of reasonable time for bargaining becomes largely irrelevant, since Respondent does not even argue, as well or it should not based on this record, that it doubted the union's majority on May 7 of 1991, nor that it was aware of any basis for taking such a position. Thus as noted in May of 1991, Respondent was not aware of the petition signed in September of 1990, and had not been informed by any employees about their dissatisfactions with the Union until July of 1991. In such circumstances, Respondent's withdrawal of recognition in May of 1991 prior to its having any doubt of the Union's majority, must be found violative of Section 8(a)(5) of the Act. It is well settled and not disputed by Respondent, that Respondent cannot rely on expressions of anti-union sentiment that came to its attention after the withdrawal of recognition, in order to justify such prior withdrawals of recognition. Manna Pro Partners L.P. 304 NLRB #104 Slip op. p. 2, ALJ slip op. p. 13, (1991); Republic Engraving &

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14. I note that Respondent was not represented by Counsel in May of 1991 when Shiels took this position.

Appendix G

Designing Co. 236 NLRB 1150, 1156 (1978); Odd Fellow Rebekah Home 233 NLRB 143, 144 (1977).

Accordingly, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union on May 7, 1991.

While I need not go any further in my analysis in order to dispose of the instant matter, I do deem it appropriate to make additional alternative findings. Thus, since the question of whether Respondent's conduct in May of 1991 constituted a withdrawal of recognition is not totally free from doubt, I shall analyze the matter further, on the alternative assumption, as argued by Respondent that the withdrawal of recognition did not take place until August of 1991, when Respondent filed its RM petition and formally withdrew recognition from the Union.

However, such an analysis does not preclude assessing whether Respondent's conduct in May and June of 1991, although not amounting to a withdrawal recognition has otherwise violated the Act. In my judgment Respondent's position on meeting with the Union, as expressed by Shiels in May and again in June of 1991, even if not construed as a withdrawal of recognition, does establish a violation of Section 8(a)(1) and (5) of the Act. I note initially that Section 7 of the Act gives employees the right to bargain through representatives of their own choosing. Generally speaking, an employer has no right to dictate to a Union who its representatives may be during bargaining, unless it establishes "a clear and present danger to the collective bargaining process", or that the presence of the objected to party would create ill will and make bargaining impossible. Milwhite Co. 290 NLRB 1150, 1151 (1988), Dilene Answering Service, Inc. 257 NLRB 284, 291

(1981). Here, while Shiels agreed to meet with the Union, he insisted on a one on one meeting with Appelgate, despite Appelgate's protestations that his bargaining committee be present as well. Neither Shiels nor Respondent have asserted that the presence of the Union's bargaining committee presented a clear and present danger to the bargaining process or would create ill will or make bargaining impossible. Thus, Respondent's insistence on meeting only with Appelgate is violative of Section 8(a)(5) of the Act. Dilene supra.

Moreover, Section 8(d) of the Act requires that the Employer "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached." Thus, Respondent does not satisfy its obligations under the Act by merely agreeing to meet with the Union, or to listen to the Union's assertions of "what the issues are or where we are". Respondent must agree to "confer" and to negotiate an agreement with the Union and to execute a written contract incorporating any agreement reached. Respondent cannot simply sit and listen to the Union's proposals, make no counterproposals, all the while insisting that the Union demonstrate its majority status by winning an election, before it engages in "formal" negotiations. Lexington Cartage supra. also See Southern Lumber Co., Inc. 229 NLRB 187, 191 (1986). (Fact that Employer offers to bargain on one condition of employment, layoff procedure, is no defense to a charge of refusing to bargain over other mandatory subjects of bargaining.)

It seems to me that Respondent did not offer to fulfill its obligations to bargain collectively with the Union by Shiels'

imposition of the above described conditions for a meeting, and that the Union was amply justified in refusing to meet in such circumstances. Respondent, as noted, argues that Shiels was merely suggesting an initial get acquainted meeting with Appelgate, and did not foreclose subsequent meetings wherein full bargaining could take place. However, as I have observed above, Shiuels did not give any indication that he contemplated such future meetings and bargaining, and to the contrary insisted on an election before any such bargaining could occur.

Accordingly, based on the foregoing, I make the alternative finding that even if Respondent's position in May and reaffirmed in June is not construed as a withdrawal of recognition, it nonetheless establishes a refusal to meet and bargain with the Union in violation of Section 8(a)(1) and (5) of the Act.

This brings me to the question of whether a reasonable time for bargaining had elapsed in August of 1991, when Respondent admittedly withdrew recognition from the Union. Respondent argues that a reasonable time had expired by August of 1991, since nearly eleven months had expired since Respondent voluntarily granted recognition to the Union. Citing Tajon, Inc. 269 NLRB 327 (1984), and Brennan's Cadillac 231 NLRB 225 (1977), where the Board found periods of 2 1/2 to four months respectively to be reasonable amounts of time, Respondent contends that the instant case should be treated similarly. Respondent further asserts that the Union was entirely to blame for the failure of the parties to meet and bargain, and that Respondent should not be blamed for the delay. I do not agree.

As noted, the test for determining what is and what is not a

reasonable time is determined by what "transpires during the time period under scrutiny rather than the length of time elapsed." King Soopers, Inc. 295 NLRB 35, 37 (1989). Various factors considered by the Board in making such a determination include whether the parties are bargaining for a first contract; whether the employer engaged in a meaningful good faith negotiations over a substantial period of time; and whether an impasse in negotiations had been reached. Gerrino, Inc. d/b/a Gerrino Restaurant 306 NLRB No. 21 AlJD slip op. p. 7 (June 21, 1991); VIP Limousine 276 NLRB 871, 877 (1985).

Based on the above criteria, it is clear that a reasonable time had not elapsed when Respondent formally withdrew recognition in August, notwithstanding the fact that eleven months had expired since recognition was granted. VIP Limousine supra at 877. The parties were bargaining for a first contract, there was no negotiations over a substantial period of time, and of course no impasse had been reached. Indeed, there was in fact no negotiations at all during this period of time. Gerrino supra at ALJD slip op. p. 8.

Nor do I agree that the blame for the failure of negotiating sessions to have occurred can be attributed solely or even primarily to the Union's dilatory tactics, as Respondent contends. It is true that the Union did cancel the one negotiation session that had been scheduled in September of 1990, and thereafter decided to postpone further efforts to reschedule a meeting, pending resolution of the unfair labor practice charges that it filed concerning Respondent's layoff of employees. However, while this decision of the Union resulted in no attempts to set up a meeting for a period of eight months, since the layoffs involved a substantial number of employees in the unit (over 25%), I do not find it unreasonable for the Union to

postpone bargaining until the charges were resolved and the number of employees in the unit was determined. In any event, Respondent cannot contend that the Union abandoned its interest in the employees, since it was vigorously processing the unfair labor practice charges with the Board. Bio-Medical Applications of New Orleans, Inc. d/b/a Greater New York Orleans Artificial Kidney Center 233 NLRB 1467-1468 (1977), Unoco Apparel, Inc. 215 NLRB 89, 91 (1974).

More significantly, I note that Respondent made no objection to the Union's apparent decision to postpone further bargaining until the resolution of the charges. Respondent made no effort to attempt to schedule another meeting during the period, apparently acquiescing in the Union's desire to resolve the charges first. Indeed, as of November 1990, when Shiels replaced Gould as president, it is obvious from Shiels' own testimony that any attempts to bargain by the Union to meet with Respondent from that time on, would have been met with the same unlawful response made by Shiels in May; i.e. Respondent would meet only with Appelgate, but would not engage in any bargaining unless and until the Union won an election.[15] In such circumstances, Respondent cannot rely on the Union's delay in scheduling bargaining to establish that a reasonable time for bargaining had elapsed. Valley-West Health Care, Inc., d/b/a Driftwood Convalescent Hospital 302 NLRB No. 95 ALJD Slip op. p. 4, 8 (1991).

Moreover, once the Union did make attempts to schedule

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15. In fact, as noted Shiels testified that he believed that these conversations took place in January 1991 shortly after he became president. However, as also noted I have concluded based on other more objective evidence that he was mistaken as to the dates of these conversations with Appelgate, and they occurred on May 7 and June 17.

negotiation sessions in May, June and July, Respondent unlawfully refused to agree to do so, clearly demonstrating that the failure to have bargaining sessions from May to August was primarily attributable to this unlawful conduct of Respondent. In this connection, Respondent relies on the fact that Osuna did attempt to telephone Appelgate in response to the Union's July written request for negotiations, and that due to an error in the Union's transmission of the message, Appelgate did not return the call. However, I place little or no significance upon this error by the Union, since there the record is not clear as to what Osuna intended to say to Appelgate. I note that Respondent adduced no testimony as to the content of the conversation between Shiels and Osuna, when Shiels instructed Osuna to call Appelgate.[16] Thus, there is no basis to conclude that even if Osuna intended to schedule a meeting with Appelgate, that the conditions would have been any different than they were in May and June, when Shiels unlawfully conditioned his agreement to meet, on a meeting with Appelgate alone, with further negotiations to be scheduled only if the Union were successful in the election.

Accordingly, based on the foregoing analysis and authorities, I conclude that a reasonable time for bargaining had not elapsed when Respondent formally withdrew recognition from the Union in August of 1991. Having so concluded, it then becomes unnecessary for me to make any findings on the sufficiency of Respondent's objective considerations for withdrawing recognition since absent a reasonable time for bargaining having elapsed, evidence of employee dissatisfaction with the Union is irrelevant. Valley West supra ALJD slip op p. 9; Gerrino supra. ALJD slip op. p. 9.

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16. Indeed, Shiels did not testify at all about the matter.

Appendix G

However, since I have been making alternative findings in this decision already, I do deem it appropriate to continue such an approach, and shall analyze further on the assumption that a reasonable time for bargaining had elapsed by August, when recognition was formally withdrawn.

In that event, however, it must be noted that I have also found above, that Respondent's conduct in May and June of refusing to meet and bargain with the Union (even assuming it did not constitute a withdrawal of recognition) was violative of Section 8(a)(1) and (5) of the Act. Such conduct by Respondent which strikes at the heart of the Union's legitimate role as representative of its employees, would likely have contributed to the Union's loss of standing among the unit employees, thereby rendering unreliable any subsequent employee dissatisfaction with the Union. Midway Foodmart, Inc. 293 NLRB 152 fn. 2 (1989). Therefore, the withdrawal of recognition even if construed as having not being effectuated until August, was still tainted by these unremedied unfair labor practices committed by Respondent, and is therefore unlawful. Lee Lumber and Building Material Corp. 306 NLRB No. 29 slip op. p. 3 fn. 15 (February 27, 1992), Bay Area Mack 293 NLRB 125, 131 (1989); Midway Foodmart supra.

So, in sum, I have concluded above that (a) Respondent withdrew recognition from the Union on May 7, when it had no doubt of the Union's majority status; (b) even if it was found that recognition was not withdrawn until August as contended by Respondent, that a reasonable time for bargaining had not elapsed; and (c) even if a reasonable time had elapsed by August, that Respondent's unremedied unfair labor practices tainted its subsequent withdrawal of recognition.

Appendix G

Thus, only if all three of the above findings are reversed, does it become necessary to evaluate the sufficiency of the objective considerations relied upon by Respondent in withdrawing recognition. Though, I consider such an eventuality unlikely, I shall make such an evaluation, in keeping with my decision to make alternative findings.

Respondent, in its letter signed by Shiels, filed in support of its RM petition, sets forth in substance three reasons as objective considerations which allegedly formed the basis for its doubt that the Union represented a majority of its employees. One of the reasons asserted in that document indicates that Respondent was "advised by the Board in September or October of 1990 that the Union had refused the Company's offer of voluntary recognition, and the Union, in fact, made no effort to bargain at any time between September 7, 1990 and July 17, 1991."

Although this assertion appeared in Respondent's position paper submitted to the Board in connection with the ULP charge and in the instant letter, Connell who testified at the hearing herein, could not recall the Board Agent making this statement to him, but claims that he would not have written it in the position paper had it not been told to him. Particularly, where the Union through Appelgate has credibly denied ever making such a statement to the Board Agent, I find Connell's testimony insufficient to conclude that the Union ever had refused Respondent's offer of voluntary recognition. Moreover, I note that no testimony was adduced from either Shiels or Osuna that in fact Respondent relied upon the alleged refusal to accept recognition by the Union, in concluding that the Union lost its majority status. Indeed, the only testimony in any way related to this issue was Osuna's response that Respondent understood

that the election was postponed as a result of the unfair labor practice charges that had been filed against Respondent. Finally, in my view, Respondent is not entitled to rely upon second hand advice received from Board Agents as to what the Union allegedly told the Agent concerning its recognition desires. Cf Kuna Meat Co. 304 NLRB No. 129 Slip op. p. 2 fn. 2 (1991); and cases cited therein.

Accordingly, I conclude that Respondent cannot place any reliance upon this alleged statement to support its withdrawal of recognition.

Respondent places its principal reliance upon the petition executed by eight bargaining unit employees in September of 1990, stating they do not want to be represented by the Union, but not submitted to Respondent until July of 1991. The petition, which in July of 1991, contained the names of seven bargaining unit employees as of that date, was given to Respondent by supervisor Bill O'Donnell who had prepared and circulated the petition in September of 1990 when he was a unit employee. General Counsel argues that Respondent cannot rely on the petition, because it was received from O'Donnell who was a supervisor at the time he transmitted to Respondent, and that the petition is therefore tainted by O'Donnell's participation in its preparation and circulation. Walker Mfg. Co. 288 NLRB 888 (1988). I do not agree. The critical question to be determined is O'Donnell's status at the time that he became involved in the preparation and circulation of the petition, not the time that he presented it to higher officials of Respondent. Since it is clear that O'Donnel was not a supervisor in September of 1990, and there is no evidence of any supervisory involvement in the petition at that time, I conclude that O'Donnell's mere transmission of the petition to Respondent

in July of 1991, when he was a supervisor, does not taint the petition.[17]

However, I agree with General Counsel's alternative position and citation of authority, that Respondent cannot rely on the petition, because it was executed at a time that no question concerning representation could have been raised. United Supermarkets, Inc. 287 NLRB 119, 120 (1987). Thus, since had the petition been submitted to Respondent in September of 1990 when it was signed, clearly a reasonable time for bargaining would not have expired, and it could not have been considered as a basis to question the Union's majority or withdraw recognition at that time.[18] Royal Coach supra. Thus, since Respondent could not rely on the petition in September of 1990, it cannot subsequently rely on it to justify a more timely withdrawal of recognition in July of 1991. United Supermarkets supra; See also VIP Limousine supra at 878.

Respondent attempts to distinguish United Supermarkets supra on the grounds that the case did not involve a voluntary recognition, but a certification, which Respondent argues "is treated very differently than a case where the one year certification bar applies." However, while there are differences between voluntary recognition and certification in various respects, I do not believe that there is any difference with respect to the principles applicable to the question involved here. Thus,

17. Walker Mfg. supra cited by General Counsel is not to the contrary, as that case deals with well settled principles involving supervisory participation and involvement with a petition at the time that the petition was executed by the employees.

18. It is also noteworthy that the petition contained only eight signatures out of a unit of nineteen employees in September of 1990, less than a majority of employees in the unit.

in Keller Plastics Eastern, Inc., 157 NLRB 583 (1966), the Board held that in a bargaining relationship "established as a result of voluntary recognition of a majority representative, . . . like situations involving certifications, Board orders, and settlement agreements, the parties must be afforded a reasonable time to bargain." Id at 587. Thus, the Board treats all types of recognition similarly with respect to the requirement that a "reasonable time to bargain" must be afforded. While in a certification situation, a reasonable time is defined as at least one year, and in other situations the determination is based on a number of factors, there is no difference when it comes to evaluating the quantum of evidence necessary to support an employer's good faith doubt, between a bargaining relationship established by a certification vis a vis other methods such as voluntary recognition.

Therefore, I conclude that Respondent cannot rely on the petition executed in September of 1990 to support its assertion that it reasonably doubted the Union's majority status in July or August of 1991.

That leaves for consideration Respondent's final contention, that it received direct and indirect communications from employees in July of 1991, that they did not wish to be represented by the Union. Since Respondent's own witnesses, as well as its letter supporting the RM petition, indicate that at best six employees expressed their dissatisfaction with the Union, this number constituting less than a majority of the fourteen employees in the unit, would be insufficient to establish a reasonable doubt, even if credited, and even if all of the statements were deemed sufficient to establish a desire not be represented by the Union. Dy-Dee Wash, Inc. 228 NLRB 389, 390 (1977). Therefore, I have concluded that it is unnecessary

to resolve the confusing and often contradictory testimony of Respondent's own witnesses, as to what was said by employees to its supervisors when and by whom concerning union representation.[19]

Moreover, an evaluation of the statements allegedly made to Respondent's supervisors does not permit Respondent to rely on some of the assertions to establish its alleged reasonable doubt of majority status. Thus, Respondent concedes that as to two of the six employees who allegedly expressed their anti-union sentiments, two of them, Sudhirnbai and Thakorbai Patel did so only through the statements of other employees. The Board, supported by the Courts has consistently placed little or no reliance upon statements of employees purporting to represent the views of other employees. Manna Pro Partners, L.P. 304 NLRB No. 104. Slip op p. 4 (1991); Westbrook Bowl 293 NLRB 1000, 1001 (1989); Larsen Supply Co. 289 NLRB 295 (1988); Alexander Linn Hospital Assn. 288 NLRB 103, 109 (1988); Bryan Memorial Hospital v NLRB 814 F2d 1259, 1263 (8th Cir1987), NLRB v Walkill Valley General Hospital 866 F2d. 632, 637 (3rd Cir.1989). Therefore, Respondent cannot rely on the statements of the other Patels (who are not related) to establish the anti-union sentiments of these two employees.[20]

19. For example, Paino testified that Rybski made direct statements to him concerning his dissatisfaction with the Union. Rybski did not recall such a conversation and his pre-trial affidavit specifically denies having such a conversation. The record also contains substantial contradictions concerning the purported conversations with the various Patels which I have described above, which I shall not resolve.

20. The record does reflect according to Sudhirnbai's testimony, that he was approached by Supervisor Leggin in the cafeteria and asked if he wanted the Union. In response to this inquiry, Sudhirnbai testified

(Cont'd)

Accordingly, the best that can be said for Respondent's "objective considerations", comes down to direct statements from only four employees out of a unit of fourteen employees, which indicate dissatisfaction with union representation, which is far from sufficient to establish a reasonable doubt of the Union's majority status.

Therefore, based upon the foregoing analysis and authorities, I find that Respondent has violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union, whether it is found that the withdrawal took place in May as contended by General Counsel and as I have found, or in August as asserted by Respondent.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing on and after May 7, 1991 to meet and bargain with the Union, and by withdrawing recognition from

(Cont'd)

that he responded that he did not want the Union. Respondent cannot rely on this conversation, even if credited to establish its reasonable doubt, since the information emanated from an unlawful interrogation. Hajoca Corp. 291 NLRB 104, 105 (1987) enfd. 872 F2d. 1169, 1176 (3rd Cir.1989). Moreover, since neither Leggin nor any supervisor testified about this alleged conversation, and no memo in Respondent's file referred to it, I conclude that Respondent did not rely on this fact in making its decision to withdraw recognition, and cannot rely on it in this proceeding.

the Union at that time as the exclusive majority representative of its employees in an appropriate unit, Respondent has violated Sectioon 8(a)(1) and (5) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has violated Section 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmation action necessary to effectuate the policies of the Act.

Upon the following findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act. I issue the following recommended:

ORDER[21]

The Respondent, Exxel-Atmos, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

a) Withdrawing recognition from and refusing to meet and bargain collectively with United Steel Workers of America, AFL—CIO, herein called the Union, as the exclusive bargaining

21. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, he adopted by the Board and all objections to them shall be deemed waived for all purposes.

repesentative of its employees in the appropriate bargaining unit set forth below.

b) In any like orrelated manner interfering with or restraining or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

a) Upon request, recognize meet and bargain collectively in good faith with the Union as the exclusive collective bargaining representative of its employees in the unit described below, regarding wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody it in a signed contract. The appropriate unit is:

All full-time and regular part-time production and maintenance employees, quality control employees, laboratory technicians, and senior laboratory technicians employed by Respondent at its Somerset, New Jersey facility, but excluding all office clerical employees, professional employees, sales employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Somerset, New Jersey copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 22, after

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22. If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to Emloyeesare customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated: Washington, D.C. July 23, 1992

Steven B. Fish
Administrative Law Judge

Appendix G

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition from or refuse to meet and bargain collectively with United Steel Workers of America, AFL—CIO, herein called the Union, as the exclusive bargaining representative of our employees in the appropriate bargaining unit set forth below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL upon request, recognize, meet and bargain collectively in good faith with the Union as the exclusive collective bargaining representative of our employees in the unit described below, regarding wages, hours, and other terms and conditions of employment and if an agreement is reached, embody it in a signed contract. The appropriate unit is:

All full-time and regular part-time production and maintenance empployees, quality control employees, laboratory

technicians, and senior laboratory technicians employed by us at our Somerset, New Jersey facility, but excluding all office clerical employees, professicnal employees, sales employees, guards and supervisors as defined in the Act.

Exxel-Atmos, Inc.

National Labor Relations Board (N.L.R.B.)

309 NLRB 1024, 309 NLRB No. 165, 1992 WL 390103 (N.L.R.B.), 143 L.R.R.M. (BNA) 1042, 1992-93 NLRB Dec. P 17,677

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APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA FILED AUGUST 26, 1998

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1997 **No. 97-1417**

Exxel/Atmos, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

United Steelworkers of America ,

Intervenor

Consolidated with 97-1418

BEFORE: Wald, Sentelle and Randolph, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing filed July 30, 1998, it is **ORDERED** that the petition be denied.

Per Curiam

Appendix H

FOR THE COURT:
Mark J. Langer, Clerk
By: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX I — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA FILED AUGUST 26, 1998

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1997 **No. 97-1417**

Exxel/Atmos, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

United Steelworkers of America ,

Intervenor

Consolidated with 97-1418

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

Appendix I

ORDER

Upon consideration of peitioner's Suggestion for Rehearing *In Banc,* and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
By: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX J — LETTER TO MARK J. LANGER FROM JOHN D. BURGOYNE AND ATTACHED JUDGMENT, DATED AUGUST 21, 1998

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

August 21, 1998

Mark J. Langer, Esquire
Clerk, United States Court of Appeals
for the District of Columbia Circuit
3rd & Constitution Avenue, N.W.
Room 5419
Washington, D.C. 20001-2866

Re: Nos. 97-1417 & 97-1418,
Exxel/Atmos, Inc. v. NLRB
(D.C. Cir.)
Board Case No. 22-CA-20475

Dear Mr. Langer:

As directed by the Court's order of August 14, 1998, please find enclosed an original and four copies of the Board's proposed judgment, with the Court's modifications in the above-entitled matter.

Very truly yours,
s/ John D. Burgoyne
John D. Burgoyne
Acting Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2960

Appendix J

cc: Francis A. Mastro
Apruzzese, McDermott
Mastro & Murphy
P.O. Box 112
Liberty Corner, NJ 07938

Daniel M. Kovalik, Esq.
Assistant General Counsel
United Steelworkers of America, AFL-CIO-CLC
Five Gateway Center
Pittsburgh, PA 15222

Appendix J

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos.97-1417, 97-1418

EXXEL/ATMOS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED STEELWORKERS OF AMERICA,

Intervenor.

JUDGMENT

Before: WALD, SENTELLE, and RANDOLPH, Circuit Judges.

THIS CAUSE came to be heard upon a petition filed by Exxel/Atmos, Inc., to review an order of the National. Labor Relations Board in Board Case No. 22-CA-20475, issued on June 5, 1997, and Upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on April 9, 1998, and has considered the briefs and transcript of record filed in this cause. On June 26, 1998, the Court, being fully advised of the premises,

handed down its opinion granting in part and denying in part enforcement of the Board's Order. in conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Petitioner, Exxel/Atmos, Inc., Somerset, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from refusing to bargain with United Steelworkers of America, AFL-CIO, as the exclusive bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees, quality control employees, laboratory technicians, and senior laboratory technicians employed by the Company at its Somerset, New Jersey facility, but excluding all office clerical employees, professional employees, sales employees, guards and supervisors as defined in the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Recognize and, on request bargain in good faith with the Union as the exclusive representative of the employees in the unit, and embody any agreement roached in a written contract.

(b) Within 14 days after service by the Region, post at its facility in Someset, New Jersey, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided

by the Regional Director for Region 22 of the National Labor Relations Board (Newark, New Jersey), after being signed by the company's authorized representative, shall be posted hy the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material, In the event that, during the pendency these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed hy the Company at any time since December 7, 1994.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided hy the Region attesting to the steps that the Company has taken to comply.

IT IS FURTHER ORDERED that the parties shall bear their own costs,

_____
Circuit Judge, United States
Court of Appeals for the
District of Columbia Circuit

_____
Circuit Judge, United States
Court of Appeals for the
District of Columbia Circuit

_____
Circuit Judge, United States
Court of Appeals for the
District of Columbia Circuit

Appendix J

APPENDIX

NOTICE TO EMPLOYEES
POSTED PURSUANT TO A JUDGMENT OF
THE UNITED STATES COURT OF APPEALS
ENFORCING AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities

WE WILL NOT refuse to bargain with United Steelworkers of America, AFL—CIO as the exclusive representative of the employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees, quality control employees,

laboratory technicians, and senior laboratory technicians employed by us at our Somerset, New Jersey facility, but excluding all office clerical employees, professional employees, state employees, guards and supervisors as defined in the Act.

WE WILL, on request, recognize and bargain in good faith with the Union as the exclusive representative of the employees in the unit, and embody any agreement reached in a written contract.

EXXEL-ATMOS, INC.

APPENDIX K — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JUNE 26, 1998

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1417

September Term, 1997

UNITED STATES COURT APPEALS

FOR DISTRICT OF COLUMBIA CIRCUIT

Exxel/Atmos, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

United Steelworkers of America,

Intervenor,

Consolidated with 97-1418

It Is ORDERED, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41 (a). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Appendix K

FOR THE COURT:

Mark J. Langer, Clerk
BY: s/ Eva Brown
Eva Brown
Deputy Clerk

APPENDIX L — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA FILED SEPTMEBER 22, 1998

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1998 **No. 97-1417**

Exxel/Atmos, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

United Steelworkers of America,

Intervenor

Consolidated with 97-1418

BEFORE: Wald, Sentelle and Randolph, Circuit Judges

ORDER

Upon consideration of petitioner's motion for stay of mandate, the responses thereto and of the reply, it is

ORDERED that the motion is granted. The Clerk is directed to withhold issuance of the court's mandate through October 1, 1998.

Appendix L

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
By: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX M — LETTER TO ANDREW J. CHARNICK, JR. FROM FRANCIS J. CONNELL III DATED JANUARY 10, 1998

DRINKER BIDDLE & REATH
PHILADELPHIA NATIONAL BANK BUILDING
BROAD AND CHESNUT STREETS
PHILADELPHIA, PA 19107
TELEPHONE: (215) 985-2700
TELEX: 834684
FAX: (215) 288-2757

January 10, 1995

Via Telecopier

Mr. Andrew J. Charnick
Staff Representative
United Steelworker's of America (AFL-CIO)
District No. 8
311 Route 156
Yardville, NJ 08620

Dear Mr. Charnick:

I represent Exxel/Atmos, Inc., and I write this letter on its behalf.

Exxel/Atmos has just learned that a number of employees have submitted a request to the National Labor Relations Board for a decertification election. The Company believes that the decertification effort is supported by a majority of the current workforce. In view of this development, Exxel/Atmos believes that it would be prudent to delay the beginning of negotiations

with the USWA pending clarification of the status of the decertification effort. Therefore, the Company's representatives will not meet with you tomorrow, as scheduled.

When we have obtained clarification of the situation regarding the pending decertification effort from the NLRB, we will contact you.

Do not hesitate to contact me, or to have your attorney contact me, if you have any questions about this.

Very truly yours,
s/ Francis J. Connell III
Francis J. Connell III

FJCIII/sd

APPENDIX N — LETTER TO REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD FROM FRANCIS J. CONNELL III DATED JANUARY 10, 1998

DRINKER BIDDLE & REATH
PHILADELPHIA NATIONAL BANK BUILDING
BROAD AND CHESNUT STREETS
PHILADELPHIA, PA 19107
TELEPHONE: (215) 985-2700
TELEX: 834684
FAX: (215) 288-2757

January 10, 1995

Via Telefacsimile & First Class Mail

Regional Director
National Labor Relations Board, Region 22
970 Broad Street Room 1600
Newark, New Jersey 07102-2570

Re: Exxel/Atmos, Inc.
Case No. 22-CA-17899

Dear Sir:

I represent Exxel/Atmos, Inc. ("Exxcel"), which is the respondent in Case No. 22-CA-17889. On November 14, 1994, the United States Court of Appeals for the District of Columbia circuit issued a judgment requiring, in part, that Exxel cease and desist from withdrawing recognition from and refusing to bargain collectively with the United Steel Workers of America ("USWA").

Appendix N

In compliance with the Court of Appeal's judgment, Exxell had scheduled an initial meeting for purposes of collective bargaining with the USWA for tomorrow afternoon. However, Exxewl has just learned that a number of bargaining unit members have filed a petition with your office to decertify the USWA. Therfore, Exxel has notified the USWA that it desires to delay the beginning of negotiations until the status of this decertification effor can be clarified.

I would greatly appreciate your contacting me as soon as possible to advise me of the status of any decertification petition which has been filed by employees of Exxel. Also, if a decertification petition has been filed, I request that you advise me, as Exxel's attorney, whether the petition has been signed by at least 50% of the current bargbaining unit, which currently consists of 23 employees.

Please feel free to call me at (215) 988-2926 to discuss matter.

Respectfully yours,

s/ Francis J. Connell III
Francis J. Connell III

FJCIII/lkb

cc: Mr. Ronald Lemke (Exxel/Atmos, Inc.) (via telefacsimile)
Mr. Andrew J. Charnick, Jr. (United Steelworkers of America) (via telefacsimile)
Mr. Edward Peterson (NLRB) (via telefacsimile)

APPENDIX O — LETTER FROM THE NATIONAL LABOR RELATIONS BOARD TO JAY SONI, DATED JANUARY 13, 1995

United States Government

NATIONAL LABOR RELATIONS BOARD
Region 22
370 Broad Steet - Room 1600
Newark, NJ 07102-2570

January 13, 1995

Jay Soni
315 Pegasus Road
Piscataway, New Jersey 08854

Re: Excell/Atmos

Dear Mr. Soni:

Your mailing was received in this office on January 11, 1995. Based on the materials you submitted, you may desire to file a formal decertification petition. Please call the undersigned at (201) 645-3492, or visit the Information Officer at the above address between the hours of 8:45 a.m. to 5:15 p.m. Time may be critical in the handling of this matter. Please call or visit the Information Officer as soon as possible.

Very truly yours,

s/ Susan D. Schwartz
Susan D. Schwartz
Board Agent

APPENDIX P — NOTICE OF REFUSAL TO JOIN UNION, DATED JANUARY 3, 1995

Date: 1/3/95

Board of Directors
National Labor Relations Board
Region 22
970 Broad Street, Room 1600
Newark, NJ 07102-2570
(201) 645-2100

Dear Sirs/Madams:

My name is Jay R. Soni and I am currently employed with Exxel Atmos Container Inc. which is located at 33 Schoolhouse Road, Sommerset, NJ, 08873. I have read the current proposal to join the union. After due consideration, I have concluded that I do not wish to join the union at this time.

Sincerely,
s/ [illegible]

cc: Labor Board
Exxel/Atmos

APPENDIX Q — PETITION OF THE NATIONAL LABOR RELATIONS BOARD, DATED JANUARY 26, 1995

FORM NLRB-502

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

DO NOT WRITE IN THIS SPACE

Case No. 22-RD-1136

Date Filed 1/26/95

* * *

1. PURPOSE OF THIS PETITION (If box RC, RM, or RD is checked and a charge under Section B(b)(7) of the Act has been filed involving the employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)

* * *

XX RD-DECERTIFICATION - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.

* * *

2. Name of Employer *Exxel/Atmos, Inc.*
Employer Representative to contact *Ron Lumke, President*
Telephone Number *908-560-3655*

Appendix Q

3. Address(es) of Establishment(s) involved (Street and number, city, state, ZIP code) *33 Schoolhouse Road, Somerset, NJ 08873*

4a. Type of Establishment (Factory, mine, wholesaler, etc.) *Factory*

4b. Identify principal product or service *Plastic containers*

* * *

6a. No of Employees in Unit: Present *28*

* * *

8. Name of recognized or Certified Bargaining Agent (if none, so state) *United Steelworkers of America, AFL-CIO*

Affiliation *AFL-CIO*

Address and Telephone Number *311 Route 156, Yardville, NJ 08620*

* * *

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name of Petitioner and Affirmation, if any Jay R. Soni, An individual

By s/ Jay R. Soni 1/26/95
Signature of Representative or person filing petition

Appendix Q

Title *An individual An individual*

Address *315 Pegasus Rd., Piscataway, NJ 08854*

Telephone *908-985-3135*

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

APPENDIX R — LETTER TO SUSAN D. SCHWARTZ, BOARD AGENT FOR THE NATIONAL LABOR RELATIONS BOARD FROM FRANCIS J. CONNELL III DATED JANUARY 30, 1995

1345 CHESNUT STREET
PHILADELPHIA, PA 19107-3496
TELEPHONE: (215) 985-2700
TELEX: 834684
FAX: (215) 988-2757

January 30, 1995

Via Fax and Certified Mail

Ms. Susan D. Schwartz
Board Agent
National Labor Relations Board
Region 22
970 Broad Street — Room 1600
Newark, NJ 07102-2570

Re: Exxel/Atmos, Inc. — Case No. 22-CA-17889

Dear Ms. Schwartz:

I am writing to confirm the conversations we have had during the past two weeks (most recently on January 25) regarding the inconsistency between the Notice which the Board has asked Exxel/Atmos, Inc., ("Exxel") to post in its plant, and Exxel's actual obligations under the cease and desist order which the Court of Appeals has enforced.

There is no question that the order which the Court of Appeals has enforced is a cease and desist order. The Board has stated in documents filed with the Court of Appeals is this

case that, under the cease and desist order, the employees may seek to decertify the Union at any time after issuance of the order, and the employer may similarly withdraw recognition and refuse to bargain with the union based upon a good faith doubt regarding the Union's continuing majority status. For example, in its opposition to Exxel's Motion to Strike the Board's. Proposed judgment, in Board stated as follows:

> The effect of [the cease and desist order], as the Court interprets it, will be to require the Company to bargain with the Union and, if agreement is reached, to sign the collective bargaining agreement. The Order, however, will not bar the employees from seeking to decertify the Union at any time after the resumption of bargaining nor prevent the Board from, processing such a decertification request. (Slip Op. 7-11).

(Opposition of NLRB to Exxel's Motion to Strike Proposed Judgment at ¶ 5). The Board reaffirmed its position in its petition for Rehearing, in which it stated:

> . . The limited bargaining order that the panel assumes is appropriate (Slip Op. 9) — namely, a cease and desist order that is instantly terminable at the option of disaffected employees (or the employer acting on their behalf). . . .

(Board's Petition for Rehearing at 10).

Exxel agrees with the Board that, under the cease and desist order, the employees may petition the Board for decertification and Exxel may withdraw recognition and refuse to bargain so long as its actions are based on a good faith doubt about the union's continuing majority status.

Appendix R

As I stated in my letter to the Regional Director dated January 10, 1995 and in my letter to you dated January 18, 1995, Exxel has learned that 12 of the 23 members of the bargaining unit have signed statements that they do not wish to be represented by the union. Exxel has now been notified by the Board that a formal decertification petition has been filed. Based upon these employee statements and the decertification petition in Case No. 22-RD-1136, Exxel has a good faith doubt about the union's continuing majority status and, therefore, I have advised Exxel that it is not required to bargain with the union until the union's majority status has been clarified, either through a decertification election or otherwise.

The situation in which Exxel now finds itself is neither practically correct nor consistent with the Court of Appeals' decision. Exxel has no current duty to bargain with the Union, and cannot do so because of the 'employees' expression of their desire to be rid of the union and the pending decertification election. Exxel has advised both the union and the Board that it will not bargain with the union under these circumstances. Yet, the Company has posted the Board's Notice, pursuant to the Court's order, which says it will not refuse to bargain with the union. This problem is underscored by the fact that the Board has now directed Exxel to post its standard Notice to Employees regarding the decertification petition. I have advised Exxel to post that Notice in the same place where the Notice regarding the Company's obligations under the cease and desist order is posted. This situation makes no sense, and something should be done to eliminate this confusion.

This will confirm specifically that I have advised you on several occasions that, while Exxel (on my advice) has posted the Board's Notice as the Court of Appeals has ordered, the posting of this Notice is not intended to compromise in any

way Exxel's position that it currently has no obligation to recognize or bargain with the union owing to the fact that Exxel has a good faith doubt as to the union's Continuing majority status. I also wish to confirm that I have suggested that the Board amend the notice so as to accurately state Exxel's obligation under the Court of Appeals' decision — i.e., to state that Exxel's obligation to recognize and bargain with the union is subject to the condition that Exxel will have no such obligation if the union is decertified, or if Exxel has a good faith doubt as to the union's continuing majority status. You advised me on January 25 that the Board will not amend the language of the Notice. You also suggested that Exxel consider filing a motion with the Court of Appeals asking the Court to amend the language of the Notice.

I hereby renew Exxel's request that the Board amend the Notice in the manner suggested above, so as to more accurately state Exxel's obligations. I also request that the Board confirm that Exxel has no duty to bargain with the union while the decertification petition is pending.

Finally, on behalf of Exxel, I advise you that the bargaining unit currently consists of 23 employees, and request that the Board notify Exxel promptly whether the pending decertification petition in Case No. 22-RD-1136 has been signed by a majority of the bargaining unit.

I request that the Board respond in writing to the foregoing requests.

Please do not hesitate to call if you wish to discuss this with me.

Appendix R

Very truly yours,
s/ Francis J. Connell III
Francis J. Connell III

FJCIII

cc: Mr. Andrew Charnick
United Steelworkers of America

APPENDIX S — LETTER FROM THE NATIONAL LABOR RELATIONS BOARD TO FRANCIS J. CONNELL, III, DATED FEBRUARY 2, 1995

NATIONAL LABOR RELATIONS BOARD
Region 22
970 Broad Street - Room 1600
Newark, NJ 07102-2570

February 2, 1995

Francis J. Connell, III
Drinker, Biddle & Reath
1345 Chestnut Street
Philadelphia, Pennsylvania 19107-3496

Re: *Exxel-Amos, Inc.*

Dear Mr. Connell:

I am writing to respond to the issues you raised in your letter of January 30, 1995 regarding the above-captioned matter.

Please be advised that the procedure for modification of notice language is set forth in Section 10521.1 of the Compliance Casehandling Manual. In summary, absent an agreement between the parties to change the notice language, the Regional Director has no authority to modify the notice language, and any party seeking a modification must file a motion with the Board.

In regard to the Respondent's obligations under the Court Judgment which my be impacted by the decertification petition filed in Case 22-RD-1136, the Employer acts at its own risk. The Region cannot respond to your request for its position on

compliance with the pending unfair labor practice case until the completion of the investigation of the petition.

In response to your request for the Region to disclose whether the decertification petition is supported by a majority of employees, please be advised that at this time, the policy prohibiting such disclosure remains unchanged. Accordingly, your request is declined at this time.

Very truly Yours,

s/ Susan D. Schwartz
Susan D. Schwartz
Board Agent

APPENDIX T — ORAL ARGUMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DATED APRIL 9, 1998

ORAL ARGUMENT: APRIL 9, 1998

Nos. 97-1417, 97-1418

UNITED STATES COURT OF APPEAL
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EXXEL/ATMOS, INC.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC

Intervenor

ON PETITIONS FOR REVIEW AND CROSS-APPLICATIONS FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

Appendix T

DAVID A. FLEISCHER
Senior Attorney
National Labor Relations
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2987

FREDERICK L. FEINSTEIN
General Counsel
LINDA SHER
Associate General counsel
AILEEN A. ARMSTRONG
Deputy Associate General Counsel
National Labor Relations Board

* * *

B. The Board Reasonably Issued an Affirmative Bargaining Order in *Exxel/Atmos II*

This Court has already enforced the Board's cease-and-desist order in *Exxel/Atmos I.* The only remaining issue is whether the Board's affirmative bargaining order should also be enforced. As the Court noted in *Exxel/Atmos I,* (A 16), both orders require bargaining, but only the affirmative bargaining order precludes the 'filing of a decertification petition for a reasonable time. *Accord Caterair,* 22 F.3d at 1123.

In addition to reaffirming its prior issuance of an affirmative bargaining order in *Exxel/Atmos I,* (A 33-35), the Board issued such an order in *Exxel/Atmos II.* (A 29, par. 2(a)). Since the two bargaining orders are essentially identical (compare A 29, par. 2(a), with A 55, par. 2(a)), enforcement of the order in *Exxel/Atmos II* would render it unnecessary to rule

on the propriety, of the order in *Exxel/Atmos I.*

In *Caterair*, 22 F.3d at 1123, this Court described a cease and-desist order, with no decertification bar, as a "sound third option" to a new election or an affirmative bargaining order with a decertification bar. The facts of *Exxel/Atmos II* belie this description. Although the Court said in both its opinion, (A 16), and its judgment, (A 20), in *Exxel/Atmos I,* that a cease and-desist order requires bargaining, its enforcement of the cease-and-desist order did not result in any bargaining. Instead, as shown above, pp. 25-28, the Company instigated a decertification petition and then relied on that petition to cancel the very first scheduled bargaining session and refuse to consider holding another. It attempted to decide for itself the question left for the Board on remand: whether an immediate decertification petition should be allowed.

In *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944), the Supreme court, in upholding the Board's issuance of a bargaining order despite the union's loss of majority support after the employer's unlawful refusal to bargain, observed:

> The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation.

The Company is exactly the sort of "recalcitrant employer" to which the Court was referring. Its position in 1995, (A 85),

was virtually identical to its position in 1991, (A 15, 47-48): it would not bargain without an election, even though this Court had squarely held in the interim, (A 16), that the Board was not required to conduct one. Thus, although the Company's top management has changed since 1991, (A 63), its attitude toward collective bargaining has not. *Cf. Amazing Stores, Inc. v. NLRB,* 887 F.2d 328, 331 (D.C. Cir. 1989) (likelihood of employer's repetition of unlawful conduct relevant in determining whether to issue a bargaining order under *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969)).

The Company's attempt, (Br 91 14, 23-26, 37, 42), to portray itself as a champion of its employees' rights should receive short shrift. A unanimous Supreme Court disposed of a similar claim in *Brooks v. NLRB,* 348 U.S. 96, 103 (1954): "The underlying purpose of [the Act] is industrial peace. To allow employers to rely an employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it." The Supreme Court repeated these views, again unanimously, in *Auciello Iron Works, Inc. v. NLRB,* 116 S.Ct. 1754, 1760 (1996).

If, contrary to our contention, the court-enforced cease-and-desist order in *Exxel/Atmos I* meant what the Company treated it as meaning — that the Company was free to withdraw recognition immediately upon the filing of a decertification petition, without having bargained for one day, much less the four months remaining in the initial year of recognition, and without waiting for the Board to exercise its discretion to accept the petition or reject it as premature — the "third option" advocated in *Caterair* would be a sham, for in reality, the Board would have no alternative but to conduct an election. This Court has already held that the Board need not conduct an election, for to do so "would grant the Company an option to which it

was not entitled when it committed the unfair labor practice." (A 16.) The Company is still not entitled to that option. Its response to the Court's prior decision shows that there is only one way to make this clear: by enforcing the Board's affirmative bargaining order.

C. An Affirmative Bargaining Order Is An Appropriate Exercise of the Board's Remedial Discretion

In remanding *Exxel/Atmos I,* this court stressed that "'we harbor no disagreement with the Board's policy choices. We ask only for a clear statement of what those choices and the reasons for them are.'" (A 17; citation omitted.) In its decision on remand in *Caterair (Caterair International,* 322 NLRB 64 (1996)) and in its decision in *Lee Lumber,* both of which the Board cited in reaffirming its issuance of an affirmative bargaining order in *Exxel/Atmos I,* (A 33-34, 35 n.8), the Board provided such a clear statement.[9] In particular it addressed this Court's suggestions that the decertification bar that accompanies an affirmative bargaining order is an unwarranted intrusion on employee rights. *See Williams Enterprises v. NLRB,* 956 F.2d 1226, 1237 (D.C. Cir. 1992); *Caterair,* 22 F.3d at 1122; *Exxel/Atmos I,* 28 F.3d at 1248. (A 16.) In doing so, the Board explicitly engaged in a balancing of competing interests. *Caterair,* 322 NLRB at 66-68; *Lee Lumber,*

* * *

9. As the Board pointed out in Caterair, 322 NLRB at 65 & n.4 68, its rationale there closely tracks that of its earlier decision in Williams Enterprises, 312 NLRB 937, 940-942 (1993), on remand in Williams Enterprises, 312 NLRB 937, 940-942 (1993), on remand from 956 F.2d 1226 (D.C. Cir. 1992). The Fourth Circuit expressly approved the Board's reasoning in that case. See NLRB v. Williams Enterprises, Inc., 50 F.3d 1280, 1289-1290 (4th Cir. 1995).

(2)

Supreme Court, U.S.
FILED
DEC 1 1998
CLERK

No. 98-561

In the Supreme Court of the United States

OCTOBER TERM, 1998

EXXEL/ATMOS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND
UNITED STEELWORKERS OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

DAVID A. FLEISCHER
Attorney
National Labor Relations Board
Washington, D.C. 20570

18pp

QUESTIONS PRESENTED

1. Whether the employer violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), by failing to comply with a court-enforced order of the National Labor Relations Board directing the employer to cease and desist from refusing to bargain collectively with its employees' union.

2. Whether the employer waived its right to object in the court of appeals to the National Labor Relations Board's issuance of an affirmative bargaining order, by failing to contest the propriety of the order before the Board.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	8
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Caterair Int'l, 322 N.L.R.B. 64 (1996)	5, 12, 13
Dresser Indus., Inc., 264 N.L.R.B. 1088 (1982)	10
EEOC v. *FLRA*, 476 U.S. 19 (1986)	14
Facet Enters., Inc. v. *NLRB*, 907 F.2d 963 (10th Cir. 1990)	13
Lee Lumber & Bldg. Material Corp., 322 N.L.R.B. 175 (1996), remanded on other grounds, 117 F.3d 1454 (D.C. Cir. 1997)	5, 13
Marshall Field & Co. v. *NLRB*, 318 U.S. 253 (1943)	12
NLRB v. *Donnelly Garment Co.*, 330 U.S. 219 (1947)	8
NLRB v. *New Assocs.*, 35 F.3d 828 (3d Cir. 1994)	10, 11
NLRB v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953)	12
Oil, Chemical & Atomic Workers v. *NLRB*, 842 F.2d 1141 (9th Cir. 1988)	12
Peoples Gas Sys. v. *NLRB*, 629 F.2d 35 (D.C. Cir. 1980)	14
Southern Moldings, Inc. v. *NLRB*, 728 F.2d 805 (6th Cir. 1984)	12
United States v. *L.A. Tucker Truck Lines*, 344 U.S. 33 (1952)	11, 12
Woelke & Romero Framing, Inc. v. *NLRB*, 456 U.S. 645 (1982)	14

Statutes and regulation:

	Page
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 7, 29 U.S.C. 157	3
§ 8(a)(1), 29 U.S.C. 158(a)(1)	3, 7
§ 8(a)(5), 29 U.S.C. 158(a)(5)	3, 7
§ 10(e), 29 U.S.C. 160(e)	8, 11, 14
29 C.F.R. 101.18(a)	10

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-561

EXXEL/ATMOS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND
UNITED STEELWORKERS OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in this case (*Exxel II*) (Pet. App. 1a-17a) is reported at 147 F.3d 972. The decision and order of the National Labor Relations Board (Board) in *Exxel II* (Pet. App. 39-50a) is reported at 323 N.L.R.B. No. 158 (June 5, 1997).

The opinion of the court of appeals in a prior, related case (*Exxel I*) (Pet. App. 25a-38a) is reported at 28 F.3d 1243. The Board's decisions and orders in *Exxel I* (Pet. App. 59a-98a, 53a-58a) are reported at 309 N.L.R.B. 1024 (1992) and 323 N.L.R.B. No. 159 (June 5, 1997).

JURISDICTION

The decision of the court of appeals was entered on June 26, 1998. Pet. App. 1a. A petition for rehearing was denied on August 26, 1998. Pet. App. 101a-102a. The petition for a writ of certiorari was filed on October 1, 1998.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In the summer of 1990, the United Steelworkers of America (Union) began an organizing campaign at the plant of Exxel/Atmos, Inc. (Company or Exxel) and subsequently obtained authorization cards from a majority of the Company's 19 production and maintenance employees. Pet. App. 66a. On September 7, 1990, based on this showing of majority support, the Company recognized the Union as the bargaining representative of its production and maintenance employees. *Ibid.* On that same day, however, the Company laid off five bargaining-unit employees, including several of the Union's leading supporters. *Ibid.* The Union responded by canceling a contract-negotiation meeting that had been scheduled for September 12, and by filing charges with the Board alleging that the layoffs were motivated by anti-union animus. *Id.* at 67a-69a. While the unfair-labor-practice charges were under investigation by the Board, neither party attempted to contact the other regarding negotiations. *Id.* at 68a-70a.

On May 7, 1991, Union representative Daniel Applegate, upon learning that the Board's General Counsel planned to dismiss the unfair-labor-practice charges,

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[1] The judgment proposed by the Board was entered by the court of appeals on October 2, 1998. Pet. App. 107a-111a.

requested a meeting to negotiate a contract. Pet. App. 70a. The Company's new president, Bob Shiels, refused to engage in formal negotiations unless the employees voted for the Union in a Board-conducted election. *Ibid.* Applegate responded that an election was not necessary since the Company had already recognized the Union, and he demanded that formal negotiations begin at once. *Ibid.* When Shiels refused this demand, the Union filed a charge with the Board, alleging that the Company had unlawfully refused to bargain. *Id.* at 71a, 77a.

The Board, adopting the findings of its administrative law judge (ALJ), concluded that the Company withdrew recognition from the Union on May 7, 1991, without having a reasonable basis for doubting the Union's majority status, and thereby violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1) and (5).[2] Pet. App. 60a n.1, 82a-83a (*Exxel I*). The Board ordered the Company to cease and desist from its unlawful refusal to bargain, and to bargain, upon request, with the Union. *Id.* at 96a-97a.

b. On July 15, 1994, the court of appeals upheld the Board's determination that the Company had unlawfully withdrawn recognition from the Union. Pet. App. 25a-38a (*Exxel I*). The court explained that "[i]f the employer chooses voluntarily to recognize the union * * * the union enjoys a presumption of continuing

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[2] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(a)(1) proscribes employer interference with, restraint of, or coercion of employees in the exercise of their statutory rights, which include the right "to bargain collectively through representatives of their own choosing." 29 U.S.C. 157.

majority support," which is "irrebuttable" for "a reasonable time after voluntary recognition, usually one year." *Id.* at 30a-31a. The court accepted the ALJ's finding that "a reasonable time for bargaining had not elapsed between Exxel's voluntary recognition of the Union in September, 1990 and the May 7 Shiels/Applegate conversation," in which the Company withdrew recognition from the Union, "because that eight-month period falls well within the one-year window within which a voluntarily recognized union enjoys a conclusive presumption of continuing majority support." *Id.* at 32a.

The court enforced the Board's cease-and-desist order, but it remanded for further explanation of the need for an affirmative bargaining order. The court noted that, while "[c]ease and desist orders * * * require only that the employer conform his conduct to the norms set forth in the Act," bargaining orders, "under longstanding Board practice[,] * * * are accompanied by a decertification bar that prevents employees from challenging the union's majority status for a reasonable period of time." Pet. App. 34a-35a (internal quotation marks omitted). Therefore, the court noted, the Board is required to "explain that it has balanced the often competing interests of union protection and employee choice before issuing a bargaining order." *Id.* at 35a. The court added that:

> A strong argument can be made that the Board's decision to impose a bargaining order was justified because Exxel's refusal to bargain occurred during the first year of voluntary recognition. Unlike cases in which an unfair practice occurs after the first year, imposing merely a cease and desist order in first year refusal cases does not return the parties

> to status quo. * * * The cease and desist order requires the offending company to bargain, but it does so in a context outside the protective range of the one-year conclusive presumption. In such a setting, but not in the first year, the company (or its anti-union employees) would be entitled to question the union's majority status * * *. As such, the decertification bar (provided its duration is substantially tailored to restore to the union that part of the one-year period that was denied it by the company's unfair labor practice) simply affords the union the same protection it rightfully enjoyed during its first year.

Id. at 35a-36a. The court concluded, however, that "it is not for us to apply those rationales to a particular case—at least not in the first instance," for it "is up to the Board, not the courts, to make labor policy." *Id.* at 36a-37a.

c. On remand, the Board again concluded that an affirmative bargaining order was an appropriate remedy for the Company's unlawful withdrawal of recognition and refusal to bargain. Pet. App. 53a-57a. The Board based this conclusion on its holding in *Caterair International*, 322 N.L.R.B. 64, 65 (1996), that an affirmative bargaining order is a standard and "routinely appropriate" remedy for an unlawful refusal to bargain. Pet. App. 54a-56a. The Board also relied on its holding in *Lee Lumber & Building Material Corp.*, 322 N.L.R.B. 175, 177-178 (1996), remanded on other grounds, 117 F.3d 1454 (D.C. Cir. 1997), that the continuing detrimental effect of an unlawful refusal to bargain on employees' free choice can be cured only by resumption of bargaining for a reasonable time. Pet. App. 56a-57a & n.8. Accordingly, the Board required the Company,

upon the Union's request, "to bargain with it for a 'reasonable period.'" *Id.* at 57a.

2. a. On the same date that it issued its decision on remand in *Exxel I*, the Board issued another decision and order finding the Company guilty of additional unfair labor practices. Pet. App. 39a-52a (*Exxel II*). The Board found that on December 7, 1994, after the remand in *Exxel I*, Ronald Lemke, Exxel's president, gave a speech to the production and maintenance employees in which he explained the procedure for decertifying the Union and informed the employees that the Company was obligated to bargain with the Union unless it was decertified. The Company also gave each of its employees a cash Christmas bonus of $100 during the week of December 23, 1994. *Id.* at 42a-44a.

In early January 1995, one of the company's employees gave the Company form letters in which approximately 13 employees indicated to the Board that they no longer wished to be represented by the Union. Pet. App. 42a-44a. On January 10, 1995, the Company canceled all bargaining sessions with the Union, then scheduled for early 1995. *Id.* at 4a, 43a. On January 26, one of the company's employees filed a formal decertification petition with the Board. *Ibid.* The Company thereafter asserted that it was under no obligation to bargain until a decertification election was held. *Ibid.* By letters dated January 10 and 30, 1995, company counsel asked the Board's Regional Office whether a decertification petition had been signed by a majority of the Company's bargaining-unit employees. *Id.* at 118a-119a, 125a, 128a. The Regional Office declined to provide this information on the ground that Board policy prohibited its disclosure. *Id.* at 130a-131a.

The Board noted that, in its decision on remand in *Exxel I*, it reaffirmed its original finding that the proper remedy for the Company's earlier refusal to bargain with the Union was an affirmative bargaining order requiring the Company, upon request, "to bargain with the Union for a 'reasonable period of time.'" Pet. App. 44a. Finding that the Company "has never acceded to any union demands for bargaining since its August 1991 unlawful withdrawal of recognition," the Board concluded that "it is clear that a reasonable time for bargaining has not elapsed and that the [Company's] refusal to bargain violated Section 8(a)(5) and (1) of the Act." *Id.* at 45a. The Board further concluded that the Company "unlawfully instigated the decertification petition among its employees in violation of Section 8(a)(1) of the Act," and that, because the $100 Christmas bonus constituted wages, the Company's unilateral action in granting the bonus violated Section 8(a)(1) and (5) of the Act. *Id.* at 45a-46a. As a remedy, the Board again ordered Exxel to cease and desist from refusing to bargain, and affirmatively to bargain with the Union upon request. *Id.* at 48a-49a.

b. The Company sought judicial review of the Board's decision on remand in *Exxel I* and its decision in *Exxel II*. As to the Board's decision in *Exxel II*, the court of appeals held that (1) the Company president's speech about the procedures for decertifying the Union did not amount to an unfair labor practice, since it was not coercive and did not promise any benefit; and (2) there was no duty to bargain about the Christmas bonus, since it was a seasonal gift and not a part of the Company's wage structure. Pet. App. 5a-11a.

The court further held, however, that the Company's refusal to bargain with the Union in early 1995 was a "direct violation" of the court's order in *Exxel I* that

the Company "[c]ease and desist from * * * [w]ithdrawing recognition from and refusing to meet and bargain collectively with" the union. Pet. App. 12a, 13a. In addition, the court held, neither the decertification petition, nor the Board's refusal to reveal how many employees supported it, excused the Company's failure to comply with the court of appeals' order in *Exxel I*. *Id.* at 13a. Finally, the court held that Section 10(e) of the Act, 29 U.S.C. 160(e), precluded the Company from challenging the affirmative bargaining order in *Exxel II*, because the Company had not contested the propriety of that order before the Board. *Id.* at 13a-14a.[3]

ARGUMENT

1. The question whether petitioner was justified in continuing its refusal to bargain with the Union turns on whether petitioner failed to comply with the court's decree in *Exxel I*, enforcing a Board order requiring petitioner to cease and desist from refusing to bargain with the Union. That narrow, fact-based issue does not warrant review by this Court. See *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219, 227 (1947) ("the court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes") (internal quotation marks omitted). In any event, the court of appeals correctly concluded that

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[3] The court dismissed the Company's petition for review and the Board's cross-application for enforcement of the Board's supplemental decision and order in *Exxel I*. It found it unnecessary to rule on the propriety of the affirmative bargaining order issued in that case, since that order was "effectively identical" to the order in *Exxel II*. Pet. App. 14a & n.5.

petitioner had not complied with the court's prior decree.

The court acknowledged that under some circumstances an employer may suspend bargaining if it can show either that the union has lost majority support or that the employer has a reasonable, good faith doubt of continuing majority support. Pet. App. 12a. The court also recognized that Exxel twice requested by letter that the Board inform it whether a majority of Exxel's employees had petitioned for decertification, but the Board refused the request. *Id.* at 13a. The court held, however, that neither circumstance excused the Company from complying with the order entered in *Exxel I*. "It was 'utterly clear,'" the court stated, that "our order put Exxel under an affirmative obligation to bargain with the union as of November 30, 1994, the date our mandate issued." *Id.* at 12a. Instead, Exxel "held no bargaining sessions with the union in the weeks leading up to January 10. And when on that date Exxel learned of an impending decertification effort on the part of some of its employees," it "promptly canceled all planned bargaining sessions with the union, including one scheduled for the next day," even though "no decertification petition had been filed at that time." *Ibid.* The court concluded that "Exxel should have bargained with the union as soon as was practically possible following the issuance of our mandate. At the very least, it should have gone ahead with the scheduled bargaining sessions until January 26, when a formal decertification petition was filed." *Id.* at 13a.

The court of appeals reasonably interpreted its decree in *Exxel I* to require petitioner to bargain with the Union as of November 30, 1994, when the mandate issued. Pet. App. 12a-13a. The court also reasonably concluded that petitioner's failure to comply with that

obligation precluded petitioner from relying on the decertification petition that was subsequently filed on January 26, 1995. *Id.* at 13a.

Contrary to petitioner's contention (Pet. 11), the decision of the court of appeals in this case is not in "direct conflict" with that of the Third Circuit in *NLRB* v. *New Associates*, 35 F.3d 828 (1994). In *New Associates*, the employer was not under a court order to bargain, and the union was entitled only to a rebuttable presumption of continued majority status, at the time of the filing of the decertification petition. The employer was thus privileged, under the Board's decision in *Dresser Industries, Inc.*, 264 N.L.R.B. 1088, 1089 n.7 (1982), to withdraw from further bargaining with the union if presented with a valid decertification petition supported by a majority of the unit employees. Moreover, there was no assertion in *New Associates* that "the employer's unfair labor practices ha[d] caused the decertification petition to be filed in the first place." 35 F.3d at 835. It was in this context that the Third Circuit held that the Board could not withhold information as to the percentage of employees supporting the decertification petition,[4] which would allow the employer to make an "informed decision" on whether the union had, in fact, lost majority support. *Id.* at 834.

In this case, petitioner, unlike the employer in *New Associates*, refused to bargain and again withdrew recognition before the filing of a decertification petition, and therefore cannot rely on that petition to support a claim that it had a reasonable doubt of the Union's majority status when it withdrew recognition. More-

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[4] A petition for decertification will be investigated and processed by the Board if supported by at least thirty percent of the bargaining-unit employees. 29 C.F.R. 101.18(a).

over, petitioner, unlike the employer in *New Associates*, was under a court order to bargain. As the court of appeals correctly observed (Pet. App. 13a), neither the filing of a decertification petition nor the Board's refusal to reveal how many employees signed the petition excused petitioner from complying with that order.

2. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that, on a petition for review or application for enforcement of a Board order, "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure * * * to urge such objection shall be excused because of extraordinary circumstances." Petitioner does not challenge the finding of the court of appeals (Pet. App. 13a) that petitioner did not argue before the Board that an affirmative bargaining order was not an appropriate remedy in *Exxel II*. Rather, petitioner argues (Pet. 17-20) that it was not required to present this contention to the Board. That contention raises no issue warranting further review by this Court.

a. There is no merit to petitioner's suggestion (Pet. 18) that the relevant provision of Section 10(e) applies only to objections to substantive findings of unfair labor practices and not to objections to the Board's remedial order. The plain language of the statute makes no such distinction; it says that *no* objection not raised before the Board may be considered by a reviewing court. Section 10(e) merely codifies the longstanding doctrine of exhaustion of administrative remedies, as articulated in *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952): "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection

made at the time appropriate under its practice." This Court and the courts of appeals have consistently applied this doctrine to bar untimely objections to Board remedial orders. See, *e.g.*, *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350 (1953); *Marshall Field & Co.* v. *NLRB*, 318 U.S. 253, 255-256 (1943); *Southern Moldings, Inc.* v. *NLRB*, 728 F.2d 805, 806-807 (6th Cir. 1984) (en banc).

b. The cases relied on by petitioner (Pet. 19) are clearly distinguishable. In *Oil, Chemical & Atomic Workers* v. *NLRB*, 842 F.2d 1141, 1144 n.2 (9th Cir. 1988), the court held that a union was not barred from challenging the retroactive application of a Board decision establishing a new rule of law. The court reasoned that the issue had necessarily been presented to the Board, because "[r]etroactivity is necessarily an issue any time a new rule of law is formulated." *Ibid.* Whatever the merits of that reasoning, it has no application in this case, where the Board announced no new rule of law, but simply followed its longstanding policy of issuing an affirmative bargaining order to remedy an unlawful refusal to bargain. See *Caterair Int'l*, 322 N.L.R.B. 64, 64, 68 (1996).[5] It was incumbent on petitioner to urge a departure from that policy.

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[5] Although the Board did not directly cite *Caterair* in *Exxel II*, it relied on, and thus incorporated by reference, its reasoning in *Exxel I*. Pet. App. 44a. In *Exxel I*, the Board expressly relied on *Caterair* as a basis for reaffirming its bargaining order. Pet. App. 54a-55a. Contrary to petitioner's contention (Pet. 17-18), the Board's findings of other unfair labor practices, which the court of appeals reversed (see p. 7, *supra*), were not the "essential roots" of the bargaining order in *Exxel II*. The Board merely treated those findings as an alternative ground for rejecting petitioner's reliance on the decertification petition. Pet. App. 46a. Its primary ground for issuing a bargaining order was the reasoning in *Exxel I* (Pet.

Similarly, in *Facet Enterprises, Inc.* v. *NLRB*, 907 F.2d 963, 970-972 & n.1 (10th Cir. 1990), the court held that it could consider a due-process issue, even though the issue had never been presented to the Board, because the Board, *sua sponte*, had expressly decided it. In those circumstances, the court held, "the policies underlying [Section] 10(e), *i.e.*, notice, efficiency and providing the Board with the first opportunity to consider a claim," were satisfied. *Id.* at 971.

In the present case, the court refused to consider the contention that "the Board failed to justify the bargaining order" (Pet. App. 13a). Nothing in the Board's decision addresses that specific contention. As has been noted, the Board's view is that it need not engage in a case-by-case factual analysis before issuing an affirmative bargaining order in a withdrawal-of-recognition case. *Caterair*, 322 N.L.R.B. at 64. If petitioner wished to argue in the court of appeals that such an analysis was necessary, it was obligated to give the Board the first opportunity to address the argument by specifically raising it before the Board. It concededly did not do so in *Exxel II*.

c. Contrary to petitioner's contention (Pet. 17-18 & n.6, 19-20 & n.7), the fact that the propriety of a bargaining order was before the Board on remand in *Exxel I* did not excuse petitioner's failure to challenge

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App. 56a-57a & n.8), which relied on *Caterair* as well as *Lee Lumber & Building Material Corp.*, 322 N.L.R.B. 175, 177-178 (1996) (adopting presumption that any decertification petition filed while employer is unlawfully refusing to bargain, or has failed to bargain for reasonable time following unlawful withdrawal of recognition, results from, and is therefore tainted by, that unlawful conduct). Cf. *Lee Lumber & Bldg. Material Corp.* v. *NLRB*, 117 F.3d 1454, 1459-1460 (D.C. Cir. 1997) (approving presumption as rational and consistent with Act).

the need for such an order in *Exxel II*. Although the bargaining orders issued by the Board in the two cases were essentially the same, the underlying issues were different. In *Exxel I*, the issue was whether an affirmative bargaining order was an appropriate remedy for a single unlawful refusal to bargain. In *Exxel II*, the issue was whether the same remedy was appropriate where petitioner had twice unlawfully refused to bargain, the second time in "direct violation" (Pet. App. 13a) of a court order. A negative answer to the former question would not necessarily imply a negative answer to the latter, for "if the employer's violation is deliberate and egregious enough, the interest in deterrence of future violations may override the employees' wishes, especially if it is likely that the workers' rejection of the Union flows from the Company's violations." *Peoples Gas System* v. *NLRB*, 629 F.2d 35, 47 (D.C. Cir. 1980). It was therefore incumbent on petitioner specifically to argue to the Board in *Exxel II* that the added factors of recidivism and disregard of a court order did not make the second withdrawal of recognition "deliberate and egregious enough" to warrant issuance of an affirmative bargaining order without the detailed analysis required by the remand in *Exxel I*.[6]

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[6] Nor is petitioner aided by the fact that the Board did not rely on Section 10(e) in its brief to the court of appeals. This Court held in *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 666 (1982), that a reviewing court "lacks *jurisdiction* to review objections that were not urged before the Board" (emphasis added). Accordingly, the court of appeals properly held (Pet. App. 14a) that the Board's failure to brief the jurisdictional issue did not waive the issue. See *EEOC* v. *FLRA*, 476 U.S. 19, 23 (1986) (provision of Civil Service Reform Act "virtually identical" to Section 10(e) "speaks to courts, not parties" and is therefore "not 'waived' simply because the FLRA fails to invoke it" in court).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

DAVID A. FLEISCHER
Attorney
National Labor Relations Board

NOVEMBER 1998

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No. 98-561

In The

Supreme Court of the United States

October Term, 1997

EXXEL/ATMOS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, and
UNITED STEELWORKERS OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

VINCENT J. APRUZZESE
Counsel of Record
FRANCIS A. MASTRO
APRUZZESE, McDERMOTT,
MASTRO & MURPHY
Attorneys for Petitioner
25 Independence Boulevard
P.O. Box 112
Liberty Corner, New Jersey 07938
(908) 580-1776

150189

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

10 pp

TABLE OF CONTENTS

	Page
Preliminary Statement	1
The Board's Factual Statement	2
The Board's Argument	2
Conclusion	5

TABLE OF CITED AUTHORITIES

Cases:

Dresser Industries, Inc., 264 NLRB 1088 (1982) 1

NLRB v. New Associates, 35 F.3d 828 (3d Cir. 1994) 1, 2, 3, 4

Statute:

29 U.S.C. § 158(a)(5) 1

United States Constitution:

United States Supreme Court Rule 15(6) 1

APPENDIX

Appendix A — Excerpts From Brief For The National Labor Relations Board Dated April 9, 1998 ..... 1a

PRELIMINARY STATEMENT

This reply brief is filed pursuant to Rule 15(6) to correct a factual omission of the National Labor Relations Board (NLRB or Board) and to respond to an argument made by the Board in seeking to distinguish the decision of the Third Circuit in *NLRB v. New Associates*, 35 F.3d 828 (3d Cir. 1994), which argument the Board did not make before the United States Court of Appeals for the District of Columbia Circuit.

It is also noted that the questions presented, as restated by the Board, ignore a principal issue raised by the petition, namely, resolution of the conflict between the District of Columbia Circuit and the Third Circuit (the jurisdiction in which Exxel/Atmos, Inc. is located) with regard to the rule established by the Third Circuit in *New Associates*. That rule, which is grounded in simple logic and fairness, is that absent other evidence that the Employer is aware of the insubstantiality of a decertification petition, the NLRB must, if requested, inform the Employer whether the petition is supported by a majority of its employees. In the absence of such a disclosure the Third Circuit will not follow the Board's ruling in *Dresser Industries, Inc.*, 264 NLRB 1088 (1982), which requires continued negotiations with an incumbent union pending resolution of the decertification procedure. In the Third Circuit, where such information had been requested and denied, a Board Order finding a violation will not be enforced, whereas in the District of Columbia Circuit apparently it will. The Court cannot ignore this striking and critical conflict with regard to basic principles of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (the Act). The issue cannot go away simply by being ignored, as the Board would apparently wish. Nor should the Board be permitted to raise, without response, an argument which it did not raise in proceedings before the Circuit Court of Appeals.

THE BOARD'S FACTUAL STATEMENT

In its recitation of the procedural history and facts of this case, the Board states that in early January, 1995, one of the Company's employees gave the Company form letters in which approximately 13 employees indicated to the Board that they no longer wished to be represented by the Union. (Bd. Br., p. 6) The Board failed to point out, however, for obvious reasons, that when then-counsel to Exxel initially asked the Board whether the petition was signed by at least 50% of the current bargaining unit he also pointed out that the unit currently consisted of 23 employees. (Pe. App., 118a-119a) *Thus, the thirteen signatures supporting decertification represented a majority of the Company's current employees.*

THE BOARD'S ARGUMENT

The Board contends that the decision of the Court of Appeals in this case is not in "direct conflict" with that of the Third Circuit in *New Associates*. (Bd. Br., p. 10) In support of that argument the Board states that in *New Associates* the employer was not under a court order to bargain and the Union was entitled only to a rebuttable presumption of continued majority status at the time of the filing of the decertification petition. (Bd. Br., p. 10) Interestingly, the Board never made that argument before the Court of Appeals. In fact, in its brief to the Court of Appeals the Board's entire discussion of *New Associates* is restricted to a footnote in which it relied exclusively upon the fact that *New Associates* was inapplicable where the employer had improperly brought about the filing of the decertification petition, or where its other unfair labor practices tainted the petition. (Supp. App. p. 2a)[1] The Board goes on to state that: "Moreover, there was no assertion in *New*

1. References to the petitioner's Supplemental Appendix are to the appendix appearing at the back of this brief.

Associates that the employer's unfair labor practices ha[d] caused the decertification petition to be filed in the first place." Citing 35 F.3d at 835. (As discussed *supra*, the Court of Appeals found no merit to any of the independent unfair labor practices alleged by the Board.) Finally, the Board states that in this case petitioner, unlike the employer in *New Associates*, refused to bargain and again withdrew recognition before the filing of a decertification petition and therefore cannot rely on that petition to support a claim that it had a reasonable doubt of the Union's majority status when it withdrew recognition. (Bd. Br., p. 10)

The latter statement is not only erroneous, but it contradicts the Board's earlier statement in its brief in which it said:

> On January 10, 1995, the Company canceled all bargaining sessions with the Union then scheduled for early 1995. . . . On January 26, one of the Company's employees filed a formal decertification petition with the Board. . . . The Company *thereafter* asserted that it was under no obligation to bargain until a decertification election was held. (Emphasis added.) (Bd. Br., p. 6)

It is obvious, therefore, that the Company did not withdraw recognition before the filing of a decertification petition. It suspended bargaining and, as conceded by the Board, withdrew recognition only after a "formal" petition was filed.[2]

It is true that the rule announced by the Third Circuit in *New Associates* permits of an exception where there is *evidence* that the employer had improperly participated in the preparation

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2. The word "formal" is significant when considered in light of the Board's brief to the Court of Appeals, in which it stated that the signed statements submitted by 13 of the Company's 23 employees were "evidently meant to serve as a decertification petition". (Supp. App., p. 2a)

and circulation of the decertification petition, or that the unfair labor practices of the Employer had caused the union to lose its majority status. 35 F.3d at 835, n.5. First, it should be pointed out that the Court of Appeals did not distinguish or discuss *New Associates* in any way. It simply cited *New Associates* without comment. (Pe. App., p. 13a) Certainly, the Court of Appeals, in rejecting the *New Associates* concept, could not have relied upon the Board's conclusion that the Employer instigated the filing of a decertification petition, since it specifically rejected that finding. Thus, the petition was not tainted as alleged by the Board. Nor could it have relied *sub silentio* upon the allegation that the Employer undermined the Union's status by the granting of a $100 bonus, since it found that the granting of such bonus did not violate the Act. Certainly, the Third Circuit, in requiring evidence of employer complicity in the filing of a decertification petition, did not intend to grant the Region *carte blanche* to deny a request for information concerning majority support of the petition simply upon the bare assertion of the Union or the unfounded conclusion of the Region, as in this case, that such unlawful participation had taken place.

It is true that the Court of Appeals held that Exxel's request did not excuse it from failing to comply with the court's earlier cease and desist order. However, it did not specifically distinguish *New Associates* on that ground, as suggested by the Board. In fact, in an earlier footnote the Court of Appeals stated:

> 4. An affirmative bargaining order and an order requiring an employer to cease and desist from refusing to bargain do not have the same consequences. Under settled Board practice only the former carries with it a decertification bar, preventing the employer from challenging the Union's majority status for a reasonable period of time. *See, e.g., Exxel/Atmos*, 28 F.3d at 1245;

Caterair, 22 F.3d at 1121-22, n.4. (Petitioner's Appendix, p. 12a)

Since no affirmative bargaining order was outstanding at the time, as stated in the above quoted footnote from the opinion of the Court of Appeals, the Employer indeed could have challenged the Union's majority status had the decertification petition been given official credibility by the Region's response to counsel that in fact it was supported by a majority of the Company's employees. Therefore, there is clearly a conflict between the District of Columbia Circuit and the Third Circuit which this court should resolve in order to preserve uniformity in the application of our national labor policy, as administered by the Board, and in order to permit Exxel employees, *finally*, after eight years, to freely express their will in a Board-conducted election.

CONCLUSION

Based upon the foregoing and our original petition, the Court is urged to grant certiorari as to both questions presented by the petitioner.

Respectfully submitted,

VINCENT J. APRUZZESE
Counsel of Record
FRANCIS A. MASTRO
APRUZZESE, McDERMOTT,
MASTRO & MURPHY
Attorneys for Petitioner
25 Independence Boulevard
P.O. Box 112
Liberty Corner, New Jersey 07938
(908) 580-1776

APPENDIX A — EXCERPTS FROM BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD DATED APRIL 9, 1998

ORAL ARGUMENT: APRIL 9, 1998

Nos. 97-1417, 97-1418

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EXXEL/ATMOS, INC.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC

Intervenor

ON PETITIONS FOR REVIEW AND CROSS-APPLICATIONS FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

* * *

Appendix A

[Commencing at p. 23]

support or that the employer had a "good-faith" doubt, founded on a sufficient objective basis, of the union's continued majority status, *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778, 787 (1990).

In withdrawing recognition from the Union in January 1995, the company relied solely on a decertification petition filed by one of its employees and on prior signed statements by a majority of the employees indicating opposition to the Union. (A 85.) The Board rejected the Company's defense, (A 28), on three separate grounds, which are equally applicable to the decertification petition and the signed statements.[5] First, the decertification petition (and the signed statements, which were submitted to the Board, (A 78-79), and were evidently meant to serve as a decertification petition) were unlawfully instigated by the Company. Second, under the terms of this Court's opinion

* * *

5. With respect to the decertification petition, the Company relies, (Br 41-42), on *NLRB v. New Associates*, 35 F.3d 828, 835 (3d Cir. 1994), which held that, where the Board refuses to tell the employer how many employees have supported a decertification petition, the employer is entitled to withdraw recognition "absent other evidence that the employer is aware of the insubstantiality of the decertification petition." This holding is, by its terms, inapplicable where the employer has improperly brought about the filing of the decertification petition or where its other unfair labor practices taint the petition. 35 F.3d at 835 n.5. Since, as shown in the text, both factors are present here, this Court need not pass on *New Associates*. We note, however, that *New Associates* effectively holds that the mere filing of a decertification petition places the burden on the General Counsel to prove that the employer did not have reasonable grounds for doubting the union's continued majority status contrary to the longstanding rule (see pp. 22-23 above) that the burden is on the employer to show that its doubt was reasonable.